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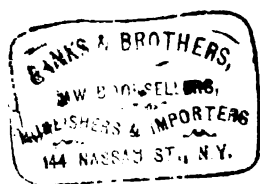
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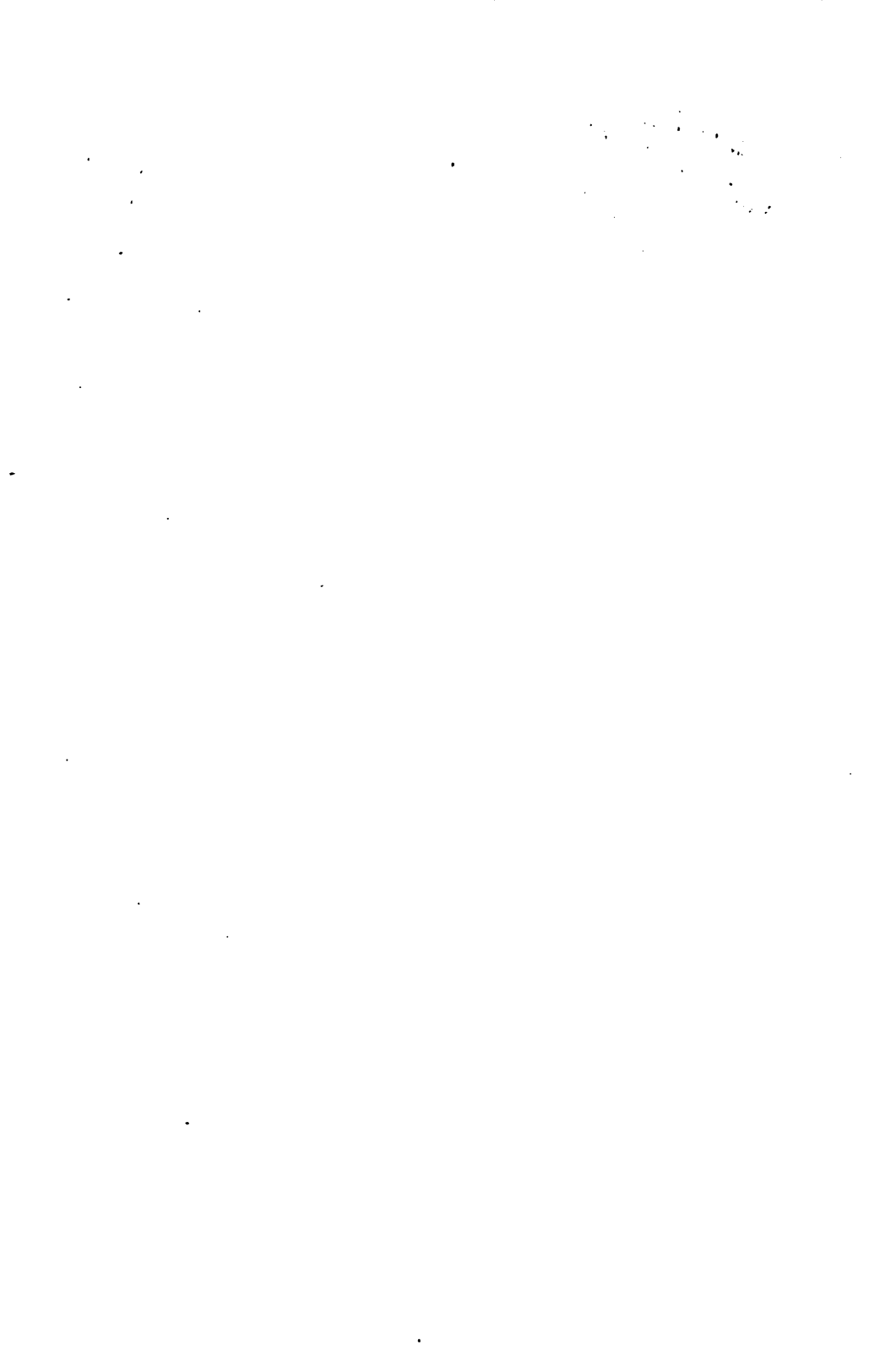
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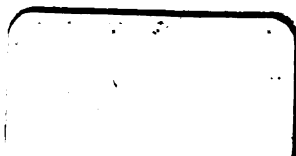
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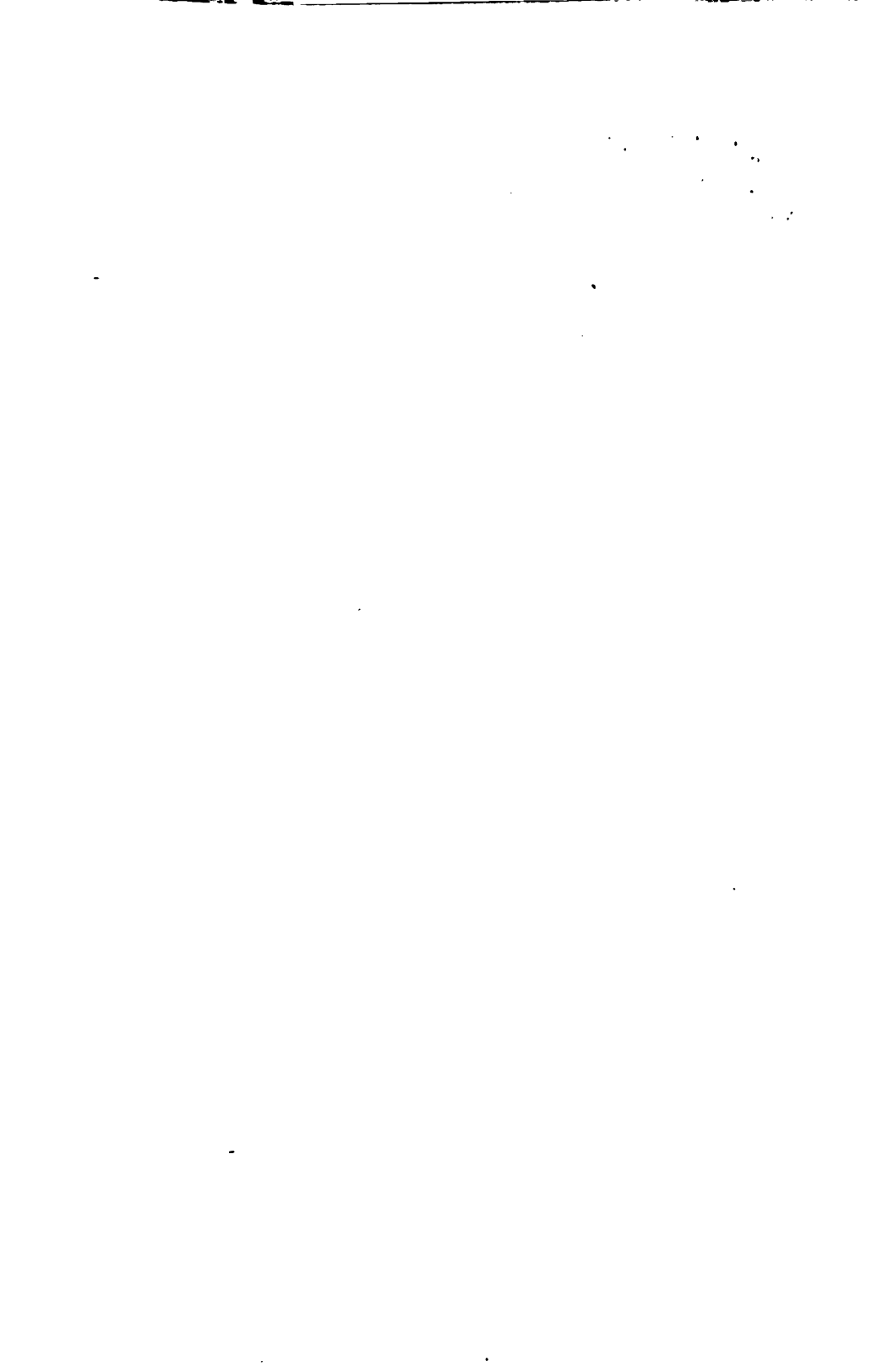




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DÉCISIONS DES TRIBUNAUX

DU

BAS-CANADA.

RÉDACTEUR: M. LELIEVRE.

COLLABORATEURS À MONTREAL: MM. BEAUDRY ET ROBERTSON.

Volume XVI.

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LOWER-CANADA REPORTS.

DÉCISIONS DES TRIBUNAUX

DU

BAS-CANADA.

QUEEN'S BENCH, }
APPEAL SIDE.

DISTRICT OF QUEBEC.

Before :—DUVAL, Chief-Justice, AYLWIN, MEREDITH,
MONDELET and BADGLEY, Justices.

THE BANK OF UPPER CANADA, *Appellants.*

and

BRADSHAW, *Respondent.*

Held :—1o. That a bank manager cannot lawfully lend the money of the bank to a company in which, as a stockholder, he is largely interested; that the bank is not called upon to look to such company, or any individual stockholder, for the money so advanced; and that the bank manager so acting is bound to refund the money to the bank, with interest from the date of service of process, unless there has been acquiescence on the part of the bank in the conduct of the manager.

2o. That a bank manager advancing the bank funds to a company in which he holds a small amount of stock, is not liable to the bank for the money so lent, if all the circumstances shew that his interest was so small that it may reasonably be presumed that his intent was solely to promote the interests of the bank.

3o. That a bank manager cannot, without being guilty of a grave dereliction of duty, become associated with a customer of the bank in an enterprise to be carried

Jugé :—1o. Que le gérant d'une banque ne peut légalement prêter les fonds de la banque à une compagnie dans laquelle il a un intérêt majeur comme actionnaire; que la banque n'est pas appelée à s'adresser à telle compagnie, ou à aucun de ses actionnaires, pour les argents ainsi avancés; et que le gérant de la banque, agissant ainsi, est tenu de refondre les deniers à la banque, avec intérêt du jour de la sommation judiciaire, à moins qu'il n'y ait eu acquiescement de la part de la banque quant aux actes du gérant.

2o. Que le gérant d'une banque avançant les fonds de telle banque à une compagnie, dans laquelle il n'a qu'un petit nombre d'actions, n'est pas responsable à la banque pour les argents ainsi prêtés, si dans les circonstances il appert que son intérêt était si minime que l'on pouvait raisonnablement présumer que son intention était seulement de promouvoir les intérêts de la banque.

3o. Que le gérant d'une banque ne saurait, sans se rendre coupable d'un grave abandon de ses devoirs, s'associer avec une des pratiques de la banque, dans une

or with the aid of the bank capital entrusted to his own care; and that the defendant, in the present case, in advancing the funds of the bank towards carrying on an enterprise in which he was himself interested, violated the well established rule of law:—"No one having duties of a fiduciary character to discharge, shall be allowed to enter into engagements in which he has or can have a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect."

40. That the liability of the defendant to make good the amount so improperly advanced to his associate had been extinguished by payment to the bank.

entreprise qui devait être conduite à l'aide des fonds de la banque confiés à ses soins; et que le défendeur, dans l'espèce, en faisant avancer des fonds de la banque pour mettre à exécution une entreprise dans laquelle il était lui-même intéressé, violait la règle de droit bien établie:—"Il ne sera permis à aucune personne ayant des devoirs d'un caractère fiduciaire à remplir, d'entrer dans des engagements dans lesquels il a un intérêt personnel opposé, ou qui pourrait être opposé, aux intérêts de ceux qu'il est tenu de protéger."

40. Que la responsabilité du défendeur, pour le montant ainsi mal-à-propos avancé à son associé, avait été éteinte par paiement à la banque.

Judgment rendered the 20th day of September, 1865.

BADGLEY, Justice :—This suit instituted by the plaintiffs against the defendant, now deceased, their former servant and Cashier of their Branch Bank at Quebec, is for damages, *dommages et intérêts* of our laws, suffered by reason of his alleged malfeasance and mis-application of their funds to his own benefit, whilst in such office, and which moneys it is declared, were due and owing by him at the institution of this action.

This contention will be governed by our own provincial jurisprudence and the established practice of our Courts, which need not the introduction of Equity rulings in the Courts of England or of the United States as our special guides in this matter.

In the summary of facts which must necessarily introduce the decision in this cause, it is sufficient briefly to state that the Bank of Upper Canada established, in 1852, a banking house and office at Quebec, with little or no capital in hand, and availed itself of the services of the deceased defendant, considered a very competent accountant, to undertake its management as Cashier. It was manifestly intended that this branch should be self-supporting and not only make, but sustain itself, and the Cashier was instructed to use his best efforts to obtain business,

in other words, to make the most out of a very questionable undertaking at the time; that he accomplished the wishes and objects of his employers, and to their frequently declared satisfaction, appears from their correspondence with him, and from the documents filed of record, whilst after some years of laborious and unsparing service, he was enabled by his personal exertions alone, to place the branch at Quebec upon a firm basis, and from the profitable result of whose operations the mother institution gladly profited. Without objection made to him during all this period from 1852 to 1858, the deceased defendant was the Cashier and sole manager of the Branch at Quebec, and his communications with respect to its business transactions were direct to the parent Bank at Toronto, varied by several examinations of his proceedings by auditors or examiners from Toronto, whose reports were favourable, until it was thought expedient to dismiss him from his charge.

All these circumstances must be considered in the investigation of this case, not for the purpose of relieving a defaulting officer from his legal responsibilities of omission or commission, but because they are material in the investigation of the case, and have been introduced of record as evidence, and been commented upon by both parties in the argument before the Court.

It is not to be denied that as a confidential servant of the institution, the deceased defendant was bound to the greatest fidelity and care towards his employers, in his conducting of the business of the bank and in protecting its interests; his duty and his instructions required him to secure and attract business as extensively as comported with profitable bank dealings, and for that purpose to give bank facilities to creditable parties, but his position could not justify, without the express sanction of his employers, his personal application of the bank funds to his own purposes, either directly for his individual necessities or

through the intermediation of others with whom he might have business connections.

His mandate required of him a strict and paramount regard for and observance of his employers' interests, and any object or matter that could conflict his private interests against those of the institution, must necessarily be disfavoured to him, and would of course render him responsible for the payment of any loss which the bank might suffer thereby.

Now this case does not, in or of itself, belong to the known category of commercial cases introductive by statute of the application of english rules of evidence for the recovery of moneys due or accrued due, for merely commercial dealings between parties, but is one arising out of the *dommages intérêts* of our law, incurred by reason of the defendant's delict and quasi delict, *abus de confiance*, the misapplication of the bank funds intrusted to his mandate and deposit, and which, it is alleged, he has converted to his own profit and advantage to the amount of damages, *dommages et intérêts*, suffered and claimed by the plaintiffs as per declaration filed; and it is this conversion which gives the right of action and the demand for the recovery back from him of the mis-applied funds to his own use.

Now this 'cause, as submitted by the plaintiffs, has been expressly limited to the four particulars of demand following, 1° the advances made to the Quebec Mining Company, 2° the transactions with John Wilson, 3° the advance to the Telegraph Company, and 4° and last the transactions with Mackay.

My colleague, Mr. justice Meredith, has so elaborately examined these various matters that it would be an unjustifiable repetition in me to go over them again, the evidence therefore upon these several particulars will be but briefly adverted to. As to the first particular, I consider that upon the principles of law which I have stated above, the ad-

vance to the Quebec Mining Company must be refunded to the plaintiffs. The defendant was not only a considerable stockholder in that company, but one of its managing directors, and although it is probable that the advance was induced by the influence of others to save their own pockets, yet, the defendant at the time was personally a defaulter to the company, and in arrear for calls over due, to an amount nearly equal to his official advance : his participation in the direction of the company must have made him aware of its financial depression ; he could not fail to know that the advance was necessary to reinvigorate a very unproductive speculation and to give value to its stock, of which he was a considerable holder, and moreover the evidence shews that the advance was made without any security whatever. In arrear as he was to the company, he should have advanced out of his own funds ; he could not justly or legally assist the Company with the bank funds intrusted to his management, and should not therefore escape from their reimbursement. The evidence upon this particular is complete.

The other three particulars are collected together in the third count of the declaration, in which they are classed or denominated as commercial and other speculations and adventures, into which the defendant is alleged to have entered *with the intent of benefiting himself* at his employers' expense, because of which speculations, he is alleged to have withdrawn his time and attention from the affairs of the plaintiffs and mis-applied, or suffered to be mis-applied and wasted, their funds in such his speculations and adventures for his private profit and advantage.

This preamble goes for nothing in itself, as being general, and requires particular allegations in support. The substantial particulars which follow consist, amongst others, of the three above particulars, whereof the first and most important in amount is that of the Wilson transactions, amounting to \$26,000. This is concisely stated in the appel-

lants' factum submitted to this Court as follows: "That the defendant, with intent to promote his own private benefit, "connected himself with John Wilson, steamboat owner, "and advanced and expended for the purposes of the said "connection, and suffered the said John Wilson to draw "from the funds in his, the defendant's charge as manager, "large sums of money, exceeding in all \$26,000, currency.

The count in the declaration is more full as well as more special, and is set out in the declaration as follows:—

"That the defendant embarked in commercial speculations and did, during the time and times aforesaid, connect himself and form a partnership with one John Wilson, of Quebec, steamboat owner, and with intent as aforesaid, *did advance and expend for the purpose of the said connection or partnership, and did suffer the said John Wilson to draw from the said office, large sums of money for the purchase and other expenses of certain steamboats, and other matters, in which the said James Foster Bradshaw had an interest with the said John Wilson, and which the said sums of money and advances the said James Foster Bradshaw would not and could not consistently with his duty to the said plaintiffs, have furnished or made to the said John Wilson, inasmuch as THE CREDIT AND MEANS OF THE SAID JOHN WILSON DID NOT WARRANT SUCH ADVANCES OR ACCOMMODATION IN THE COURSE OF THE USUAL AND LAWFUL BUSINESS OF THE BANK,—and by reason of which said connection or partnership the said John Wilson was suffered, by the said James Foster Bradshaw, to receive, draw and expend the monies of the plaintiffs, exceeding in all \$26,000."*

The amounts which the Appellants claim as having been so advanced, are the following:

The sum of \$5002.60, as the amount, with costs of protest, of John Wilson's draft on W. Lindsay for £1250, dated 30th August, 1854, at fifteen days;

\$5002.60, the amount, with costs of protest, of another

draft of the same amount and date and same parties, at thirty days;

\$5002.00, the amount, with costs of protest, of McDonald & Logan's promissory note for £1250, dated 23rd July, 1855, at one month (less \$323.38 received on account);

\$4002.00, the amount, with costs of protest, of McDonald & Logan's note for £1000, dated 1st August, 1855, at thirty days;

\$1000.00, the amount of McDonald & Logan's cheque for £250, dated 9th June, 1855;

\$802.50, the amount, with costs of protest, of R. H. Russell's note, dated 19th September, 1855;

\$1302.60, amount of Chalmers' draft, with costs, dated 4th May, 1855;

\$1737.77, amount, with costs, of D. McGie's note, dated 4th October, 1857; and

\$1772.00, amount of overdrawn account of John Wilson.

The allegations of this count are stated too broadly: the appellants must have been aware what they could support by their evidence and its legal sufficiency, and that evidence shews clearly that the alleged general partnership between the defendant and Wilson had no existence. It is however asserted and declared that: "by reason of his partnership with Wilson, he gave accommodation from the bank funds to the latter for the purchase and expenses of steamboats, and other matters of joint interest *inter se*, to the extent of the monies charged, \$26,000, which advances were improper and unjustifiable, because, Wilson's credit and means did not warrant such advances and accommodation in the course of the usual and lawful business of the bank."

Now, this particular is double, on one hand reclaiming

the amount as an abuse of the plaintiffs' confidence in having made the advance for the defendant's own profit, and on the other hand as a malfeasance in giving bank accommodation to a customer whose credit did not justify it.

It is comprehensible that if this alleged partnership for the joint purchase of steamers generally by Wilson and the defendant had been proved in a legal manner, and that advances out of the bank funds had been made by the latter for that joint purpose, and losses followed therefrom, that is from that object, these would doubtless render the defendant liable to make the losses good: that is to say, he would be bound to refund to his employers the specific amount of those advances, with interest, whilst, on the other hand, if profits had been made by these advances, his employers would be justified in claiming those specific profits made out of their funds, employed by him out of their course of dealing. But the fact of the existence of this alleged co-partnership must first have been established in a legal manner, not as in an action *pro socio* as between partners themselves, where each have the same prevailing equities and evidence in his favour, and under his own control at the time of the transactions themselves, the books and evidences thereof, but here it is a merely civil fact to be legally established and proved in a civil suit, *inter alios*, other than the partners themselves.

It must likewise be observed, that it is the recovery of this loss occasioned to the bank funds by the alleged improper accommodation for the purchase of the steamers that can alone be sought to be recovered, because in that advance alone is to be sought the intent of the defendant's own profit, as charged against him.

The evidence upon this particular consists chiefly of the testimony of Wilson himself, and of his own books of account and entries made in them, which of course are only the mere assertions of Wilson himself, without the

acquiescence or joint action of the defendant thereon. This evidence even if it possessed a latitude of disinterested plausibility or possible truthfulness on the part of this witness, is not satisfactory to connect the alleged general business, joint transactions in the steamer speculations, with the various amounts of dishonoured paper upon which this particular is based. On the contrary, the evidence is worthless, because the bank funds in connection with this dishonoured paper are not shewn to have suffered in any way, from the alleged specific advances for the purchase of steamers by Wilson and the defendant, or on their account in any way, unless it could be found in the bank balance of Wilson's over drawn account of \$1772, made up three or four years after the steamer transactions had been closed, and after bank facilities had been received and paid back to a large amount, by Wilson, as a regular creditable customer of the Bank.

But it is proved that this dishonoured paper, which forms the basis of this particular, really formed no part of these steamer purchases. Now apart from these steamer purchases, did the defendant participate in the profits of the accommodation given for this dishonoured paper?—that is not alleged, nor has it been attempted to be proved, and however much he may have been induced to grant accommodation to Mr. Wilson individually, his indulgence in this respect would not of itself alone, subject him to personal liability therefor. The discounts of this paper do not come within the intent charged against the defendant, as having been made for his own profit, and a connection in one specific matter cannot be consequentially extended to all the remainder of the numerous transactions of a bank customer. It is not that the alleged connection with Wilson induced the banking facilities to an uncreditable customer, but that those facilities were granted for purposes of the defendant's personal advantage and profit: that alone could come within the purview of this action, and that has not been proved.

This is a conclusive answer to this particular in its first part; the second, resting upon these accommodations having been given to a person without credit, must now be considered.

So far as the evidence shews, these discounts appear to have gone upon the circumstances and credit of the parties to the paper at the time when the discounts were *originally* obtained. And upon this head, there is this charge in the declaration, that this credit should not have been given to John Wilson at all, inasmuch as his means and credit did not warrant such accommodation in the course of the usual bank business. The entire gist of the case, with reference to this dishonoured paper, lies in this allegation. There would, doubtless, have been a grave and a responsible fault in the defendant, as an officer of the bank, if he had given his discounts or afforded bank accommodation to parties notoriously insolvent or without credit. It is that character of insolvent notoriety which alone constitutes the fraud. Commercial solvency is not always a truth, and appearances are known to override realities. It could not therefore be a matter of reproach to the defendant, the cashier, if guided by those appearances and participating in a general and common error, he had discounted for parties whom he and the commercial world at Quebec believed to be solvent, although they might not have been so. His fault would only commence when the credit of those parties began to be notoriously shaken, and when he ought to have had just ground of fear for their future. He could not be held responsible for their subsequent insolvency. The evidence indicates no such uncreditable position of the parties to the paper when the accommodation was granted, on the contrary, their credit at those times, was fair, as has been proved of record, and it is only for his fault, and not for his error, that the defendant could be rendered obnoxious to complaint or liability. The appellants themselves are of this opinion, as stated by them in their factum, as follows:—

"It may at once be distinctly stated, that the plaintiffs have never sought to fasten upon the defendant losses incurred through the ordinary vicissitudes of trade, or which may have resulted from a mere error in judgment on his part. What they endeavoured to impress upon the Court below was, that the defendant, in the particular instances specified in their declaration, had abused their confidence, had embarked their moneys in matters in which he had a *personal interest*, and in so doing had committed acts wholly prohibited by law to a person occupying the position in which he stood in relation to them."

It is doubtless desirable and proper that employers should be protected against fraudulent and wilfully faulty mandatories and confidential servants, but justice cannot *ex debito* be strained to suit the views and purposes of employers only; the logic of facts and figures sometimes runs counter to what self-interest may deem to be justice, and which may be exemplified in this cause as follows: Mr. Bradshaw was removed from office about the end of November, 1858, and Wilson's account was balanced at the bank on the 28th December of that year, then shewing him in default to the Bank of \$177247. If Mr. Wilson's position and credit had been as alleged by the plaintiffs, so bad during the defendant's tenure of office, and during the time of that accommodation extended to Wilson, how did it happen that, in spite of Wilson's want of credit and of his over-drawn account, the plaintiff's should have allowed that account to remain over-drawn with all his dishonoured paper in it to the knowledge of the plaintiffs, and that he should have been allowed to renew his account with the plaintiffs? Mr. Douglas, one of the Bank officers, in answer to a pertinent question, replies: "Yes, it is true that the said exhibit now shewn to me is a true statement of promissory notes amounting to fourteen thousand two hundred and ninety one dollars and fourteen cents, discounted by the Branch of the plaintiffs at Quebec, in favor of the said John Wilson, between the twenty-sixth March, eighteen hundred and

fifty-nine, and he received the above amount of monies from the said Branch during that period." At this period Wilson was much nearer his actual insolvency than during the time when his credit was fair and the defendant accommodated him: how did this renewal of confidence arise? was there an understanding between them that the defendant should be made to suffer, not really in the interest of the Bank, but in that of Wilson? If Wilson's credit was so acknowledged, why did not the Bank at once take legal measures for the recovery of the dishonoured paper?—or was it that the defendant should be compelled by the pressure of Wilson's testimony to relieve his dishonoured liabilities? The adoption by the Bank of Wilson's new account has much the appearance of his virtual or understood discharge of his old account: under such circumstances it would be manifest injustice to permit the plaintiffs to select from a variety of dishonoured bill transactions with a customer, any particular ones to be designated specially as malfeasances by their officer, after their dismissal of him on that very account, and that immediately afterwards they should adopt the defaulting creditor for a renewal of bank favours and commercial facilities.

On both heads of this particular, it cannot stand: if the defendant have not been proved to have made those advances for his own profit, the first head fails; if again it is not proved that Wilson's credit was so bad as not to justify the Cashier in giving him the accommodation *originally* upon this paper, the second proposition fails also, and both being in fact unfounded, this second particular cannot be supported.

The third and fourth particulars are equally untenable, the former, the advance to the Telegraph Company, and the latter, the advances to Mackay.

Both appear to have been regular business transactions and accommodations: the former, moreover, as shewn in

evidence, has been assumed by the parent bank at Toronto, and cannot therefore be demanded of the defendant; the latter, Mackay's accommodations were settled for by the bank itself, long after the defendant's removal from office, by the acceptance by the bank of Mackay's compromise, and cannot therefore be turned back upon the defendant.

Except therefore as to the first particular, the judgment below I consider should be confirmed.

MEREDITH, Justice.—In this important case, which has been conducted with great care and ability, as well in the Court below as in this Court, the evidence both parol and documentary is very voluminous, covering a great number of important points. Under these circumstances, bearing in mind the great interest which the parties feel in the present proceedings, it may be necessary for me to extend the observations I am about to make to a somewhat greater length than is usual, but I shall endeavour to be as brief as possible, consistently with a clear statement of my views. The controversy between the parties is now confined to the following amounts:

1st. The sum of \$2276.72 due by the Quebec and Lake Superior Mining Company..... \$2276.72

2nd. The sum of \$1506.33 due by the Canada Grand Trunk Telegraph Association..... \$1506.33

3rd. The sum of \$25,574.47 (as stated in the Judgment, but which I make \$25,624.07) which the appellants contend was advanced to John Wilson by the late Mr. Bradshaw, in consequence and in furtherance of his interest with the said John Wilson in the steamer *Princess Royal*.....\$25,574.47

4th. And lastly.—The sum of \$1615 due by William Mackay..... \$1615.00

To each of the above claims I shall now advert in the order in which they have just been mentioned.

And, 1st, as regards the amount due by the Québec and Lake Superior Mining Company, \$2276.72.

It appears that Mr. Bradshaw held a great number of shares (the number being I believe 10,273) in that company, the operations of which were not attended with success. Mr. Forsyth, who was vice-president, says that in September, 1855. "It was then considered that the company was "almost dead, because the prospects did not look well, as "respects the getting out of copper, the expenses being "very great and the supplies small; he adds: We then "tried to see if we could not find copper and go on with "the business." Accordingly, there was a meeting of the Board of the Mining Company, at which the late defendant (he being also a director) was present, it was decided to make calls upon the Stockholders to the amount of £1600 or £1700; and upon the strength of the instalments which were to be called in, the defendant agreed that the Mining Company should have a certain credit from the bank of which he was Manager. In pursuance of the credit thus given, a draft drawn by James Wilson, the Superintendant of the Mining Company, was discounted at the Hamilton Branch of the Bank. This draft became due at Quebec and was protested for non-payment on the 24th September, 1855, and still remains unpaid, forming with costs of protest and interest the greater part of the claim for \$2276.72, now particularly under consideration. About three months after the protest of this draft, Mr. Bradshaw placed the amount due upon it to the debit side of the account of the Mining Company with the Bank, without however taking any proceedings then, or at any time afterwards, for the recovery of the amount so due.

It is to be borne in mind that the draft in question was drawn in pursuance of a credit given, upon the strength of calls to be made by the Mining Company. These calls

were made and duly met by all the stockholders, excepting the defendant himself and one other, the amount of the calls which the defendant failed to pay being £608. No proceedings appear to have been taken by the Mining Company against the defendant, which is not surprising, as the company owed him, in his official capacity, about as much as he personally owed them. The result was that the defendant obtained indulgence for a long period of time, for a debt due by him to the Mining Company, by giving that company indulgence for a debt of about the same amount due to the bank. It cannot I think be presumed that the defendant would have afforded such facilities to the Mining Company if he had not been himself a member of that company and indebted to it. But be this as it may the transaction was radically wrong. The defendant as Bank Manager could not lawfully lend the money of the Bank to a company in which he, as a stockholder, was largely interested. By doing so he created an interest in himself in conflict with his duty, whereas the rule of law is: "That an agent, during his agency, must not put himself in a position adverse to that of his principal, the reason being that even if the honesty of the agent is unquestioned, and if his impartiality between his own interest and his principal might be relied on, yet the principal has in fact bargained for the exercise of ALL the skill, ability and industry of the agent, and he is entitled to demand the exertion of ALL this in his own favour." (1) In the present case the duty of the defendant required him to coerce the Mining Company, his personal interest suggested that he should remain inactive, and whatever may have been his motives, nothing was done.

It has however been contended that the amount of this account was brought every fortnight before the directors, that they knew of it and thereby it is said sanctioned it.

(1) 1 Parsons on Contracts, p. 95:—Story on Agency, § 210:—Digest, Lib. 26, Tit. 8, sec. 2:—Domat, Liv. 2, Tit. 1, sec. 3.—Macle, p. 184, ch. 9:—6 Louisiana Rep., p. 41, Beal and McKimmon.

It is doubtless true that the defendant included this account in the statement of over drawn accounts sent from time to time to the head office at Toronto. But the directors did not know that the defendant was a member of the Mining Company, and as such owed that company a little more than the Mining Company owed the Bank. Had these material facts been known to the Bank directors it must be presumed that they would have called upon the defendant to pay at least so much of his debt due to the company as would have discharged the liability of the company to the Bank. And the Bank directors cannot by their silence be presumed to have ratified a transaction, of the true nature of which they were ignorant. "If," to make use of the words of Sir Page Wood, (1) "the whole transaction with all its attendant circumstances had been placed before the directors, then their long acquiescence, without objection, might amount to a conclusive presumption of a ratification of the act of which they now complain." (2)

The pretension that the bank must be presumed to have known that the defendant was a member of the Mining Company, because the vice-president of the bank was also a member of that company, is unfounded. It cannot be presumed that a person holding stock in a corporation, knows by whom all the remainder of the stock is held; or even that he knows who are the persons composing the board of directors. Moreover, even if it were certain that the fact of the defendant being a stockholder was known to the vice-president of the bank, the authorities establish that it could not therefore be presumed that that fact was known to the board, of which the vice-president was a member. The observation of Chief Justice Nelson, in the case of the bank of the United States vs. Davis: (3). "That

(1) 1 Jurist, 131, N. S.

(2) Vide also Story on Agency, No. 256.

(3) Hill, N. Y., Rep. 451.

"notice to a director or knowledge derived by him while
"not engaged officially in the business of the bank, cannot
"operate to the prejudice of the latter," seems to me a correct statement of the law on the subject, and very applicable to the case before us.

I do not fail to bear in mind that the Mining Company to which the advances were made was an incorporated company; and therefore, that in some respects the defendant was not as deeply interested in the affairs of the company as if it had been an unincorporated company. We know, however, that the defendant was one of the largest shareholders. Above 10,000 shares, each of the nominal value of 40s., stood in his name in the books of the Mining Company; and under these circumstances, I can see no reason for thinking that the fact of the Mining Company being incorporated ought to affect our decision.

It has also been said that the company is solvent, and therefore that the bank ought to look to them, and not to the defendant personally. It is true that the stock, or the greater part of it, appears to have been held by men who, at the time of which we speak, were in good credit; but we know the vicissitudes of trade, and we also know that although calls are cheerfully met, when profits are in view, yet that they are not responded to in the same way when the object is to wind up the affairs of an expiring concern; and, under any circumstance, no prudent banker or merchant would make advances to a Joint Stock Company with the prospect of looking to the stockholders individually for the payment of such advances.

Upon the whole I think that the defendant could not legally lend the money of the bank of which he was the manager, to a mining company in which he was deeply interested, as already mentioned; and I further think that the board of bank directors cannot be held to have known the circumstances under which the moneys of the bank

were so advanced by the defendant to the Mining Company, and I, therefore, am of opinion that there has been no acquiescence by the bank in the conduct of the defendant, and that the bank has a right to repudiate the transaction, and to call upon the defendant to return to them that portion of their funds of which he dispossessed himself without lawful authority. But, at the same time that I say I think the defendant acted illegally in this matter, I desire also to say that I see no reason for supposing that the defendant, in giving the credit in question to the Mining Company, was influenced by any improper motive. There was no secrecy or desire of concealment on his part, and the judgment of the Court, on this point, although against the defendant, will go upon a principle that does not affect his reputation. But I must add, that even this transaction, although I believe entered into by the defendant in good faith, in its sequel, illustrates the wisdom of the rule of law, which the defendant violated by acquiring an interest opposed to his duty; for it seems to me, I repeat, very improbable that the defendant, as Bank Manager, would have been so indulgent to the Mining Company if he, personally as a stockholder, had not required like indulgence from them. I now pass to the consideration of the claim of the bank for the sum due by the Canada Grand Trunk Telegraph Association, \$1506.33.

The evidence does not establish what was the amount of the capital of the Grand Trunk Telegraph Company, but Mr. John Anderson, who was the acting Director of the Company, at Quebec, says the capital of the Company was rated, he thinks, at £25 per mile, and that the line extended from Quebec to Toronto, Niagara and Detroit. The defendant became a stockholder in this Company to the extent of £100, on account of which he paid £25, and whilst he was a stockholder, viz., on the 8th July, 1854, he allowed the Company to overdraw their account at the bank to the extent of something more than £400. Subsequent payments

were however made on account of the Telegraph Company, so as to leave a balance at their debit of \$1506.88.

On the part of the defendant it is said that the object which he had in view in becoming connected with the Telegraph Company was to secure for his employers, the bank, an account which promised to be valuable; that it cannot be supposed that the interest which he had in shares, amounting in the whole to £100 only, could have induced him to make the advance of which the bank complains. Moreover the respondents allege that the transaction was a perfectly legitimate one, in the ordinary course of business; and that the bank is not exposed to loss as the company is solvent. The bank, on the other hand, contends that this part of the claim stands upon precisely the same footing as the loan to the Mining Company; and that the defendant was wrong not only in making the advances, but also that it does not appear that he ever pressed the claim against the Telegraph Company; and reference is particularly made to the Cashier's letter of the 23rd October, 1854, and the answer to it, as shewing want of diligence on the part of the defendant; and also, to the answer of the defendant to the Cashier's letter of the 22nd April, as shewing that the defendant withheld from the Cashier information which he ought to have communicated.

In the letter of the 23rd October, 1854, the defendant was directed by the Cashier to return "*all the overdrawn paper in his hands payable by the Grand Trunk Telegraph Company, or bearing the names of P. Low, Josiah Snow,*" arrangements having been made to retire it here."

Under this letter the defendant ought, it is said, to have forwarded the note for £500 in favor of P. Low, to the head office. It is however to be recollected that the defendant in the previous month of July, had charged that note to the debit of the Telegraph Company, thereby, it may be contended, depriving it of its character as a note.

And moreover it seems to me, judging from the names of the stockholders and from the calls made, that when the defendant received the letter of the 23rd October, 1854, he may reasonably have hoped that the instalment then payable to the Telegraph Company, would have been collected so as to remove all difficulty about the balance due upon their account. The Cashier's letter of the 22nd April, 1858, required the defendant to state the nature of the account in question and several others, and when and how he expected them to be covered. The defendant answered as follows: "Cecil Mortimer—\$1506.33, is an over draft of "the Grand Trunk Telegraph, now extinct, and cannot be considered of any value;" whereas he certainly ought in candour to have stated that he himself was a stockholder, and that £75 then remained to be paid upon his stock.

The statement however that it does not appear that the defendant ever pressed the claims against the Company, is not well founded, for I find that the defendant, in his letter dated 4th December, 1854, to the chairman of the Telegraph Company, requests him to have the balance in question "made good as early as convenient." And in his letter dated the 4th January, 1855, addressed to the secretary, the defendant begged to "have the amount" paid up without further "delay." And in another letter, dated 20th February, 1855, the defendant renewed his application for payment.

In the following year the Cashier, having thus made repeated applications for payment to the Telegraph Company, wrote to the head office of the bank at Toronto, saying, "I have a claim against the Canada Grand Trunk "Telegraph Company and will be obliged if you will "inform me to whom I am to apply in reference to it." To which the Cashier answered: "I will apply to the party "who had the management of the Grand Trunk Telegraph "and let you know the result;" and from this time it does not appear anything further was done until the Cashier

wrote his letter of the 22nd April, 1858. It seems probable, from the instalments still payable to the Telegraph Company, that with due diligence the amount in question might have been recovered. But I do not think that for acts merely of omission, the defendant ought to be held to a strict account, (even if the form of action admitted of it) because it is certain that the staff of officers under the defendant, at Quebec, was almost always much too weak, and that the defendant, whose zeal and ability it is impossible to question, was frequently overburdened with work, having to discharge not only his own duty but that of subordinate officers.

As to the argument based upon the smallness of the interest which the defendant had in the Telegraph the plaintiffs contend that "the *amount* of the defendant's interest "has nothing to do with the question; some men, (they "say,) think as much of £100 as others do of £100,000, and "there is no means of drawing the line. The law does "not attempt it; the law has no measure by which to "gauge the influence which a man's interest exercises, or "is calculated to exercise, over his acts. Detecting the fatal "spot, the law condemns without further enquiry."

It is doubtless true that when, by law, a witness could be objected to on the ground of interest, the amount of the disqualifying interest was unimportant; (1) but I am not aware that this rule as to interest was ever applied in the same rigorous way to a case such as the present between principal and agent.

Even as regards witnesses the wisdom of the rule was doubted. (2) And the rule whilst in force was defended rather because it was simple and of easy application than because it was just. Moreover, the reason sometimes given for it, that it could not produce much practical inconvenience

(1) 1 Starkie, 118.

(2) 1 Phillips, 42.

nience, (1) because, in general, an interested witness might be rendered competent by a release, could not, it is obvious be urged in cases between principal and agent, were the rule extended to that class of cases.

To me it seems that an agent cannot be said to put his personal interest in conflict with his duty, unless the supposed personal interest be of such a nature as to justify the supposition that it could bias the conduct of the agent in the discharge of his duty towards his principal. In the present case, however prosperous the Telegraph Company might have been, the defendant could not even hope to make upon his investment of £100 more than a very few dollars per annum in addition to simple interest; whereas the taking of the stock tended to secure for the bank an advantageous account. If the defendant had consulted merely his own ease and convenience, he could not have avoided the conclusion that any trifling gain which might result to him from the connection with the Telegraph Company, could hardly be an equivalent for the increased labor and responsibility to which that account, and the discharge of his duty as a director of the Telegraph Company, were likely to subject him. We know also that the bank put but a very small amount of capital at the command of the defendant, which made it necessary for him to display even more than ordinary zeal in endeavouring to secure accounts; and when we consider in what manner and to what extent the interests of the defendant personally, and those of the bank, were likely to be affected by the taking of the stock and the opening of the account now under consideration, it does seem to me that it may reasonably be presumed that the defendant in taking the stock in question was influenced not by his own interest, which could not thereby be affected to any extent deserving of consideration, but by the interests of the bank which were thereby promoted.

(1) 1 Phillips, 45, see particularly the observations of Chief-Justice Best, in *Hovill vs. Stephenson*, 5 Bingham, 495.

The appellants have cited authorities tending to shew that if an agent enters into engagements which give him a personal interest opposed to those of his principal, he cannot, as between himself and his principal, enter into contracts binding upon the latter. And that, in such case, no inquiry is allowed as to the fairness or unfairness of the contract.

To these rules, I am most anxious to adhere, because I believe them to be founded upon reason and a just estimate of the frailty of our nature, which should make us all anxiously avoid any attempt to serve two masters.

But the question still remains. Can the defendant, when he made the advance in question, be considered in reality to have had an interest in conflict with that of his employers? and under all the circumstances of the case it does seem to me that the question may be answered in the negative, and that we should press the rule upon which the appellants rely beyond the reason upon which it is founded, were we to apply it to the portion of the demand of the appellants at present under consideration; for the more I reflect upon the subject, the more I feel convinced that the securing of the account of the Telegraph Company for the bank was really the motive which caused the defendant to connect himself with that company.

I shall next proceed to consider that part of the case which relates to the advances made by the defendant to Mr. John Wilson, which, according to the allegations of the plaintiffs, are as follows:—

1. The sum of \$5002.60, as the amount, with costs of protest, of John Wilson's draft on W. Lindsay for £1250, dated 30th August, 1854, at fifteen days;
2. \$5002.60, the amount, with costs of protest, of another draft of the same amount and date, and same parties, at thirty days;
3. \$5002.00, the amount, with costs of protest, of McDo-

wald & Logan's promissory note for £1250, dated 23rd July, 1855, at one month (less \$323.88 received on account);

4. \$4002.00, the amount, with costs of protest, of McDonald & Logan's note for £1000, dated 1st August, 1855, at thirty days;

5. \$1000.00, the amount of McDonald & Logan's check for £250, dated 9th June, 1855;

6. \$802.50, the amount, with costs of protest, of R. H. Russell's note, dated 19th September, 1855;

7. \$1302.60, amount of Chalmers' draft, with costs, dated 4th May, 1855;

8. \$1737.77, amount, with costs, of D. McGie's note, dated 4th October, 1857; and

9. \$1772.00, amount of overdrawn account of John Wilson.

The contention of the appellants as shortly stated in their factum is that the defendant, with intent to promote his own private benefit, connected himself with John Wilson, Steamboat Owner, and advanced and expended for the purposes of the said connection, and suffered the said John Wilson to draw from the funds in his (the defendant's) charge as Manager, large sums of money, exceeding in all \$26,000 currency.

The most important evidence as to this part of the case is that of John Wilson, to whom the advances were made. This witness has said:

"In eighteen hundred and fifty-three the Government applied to me to know upon what terms I would establish a line of steamers below Quebec for the purpose of towage, and having the expectation of getting the contract, which

was to commence in eighteen hundred and fifty-four, Mr. Bradshaw, being cognizant of the whole transaction, mentioned a steamer that was at Toronto that would suit the purpose. His information was furnished by Mr. Cochrane, Agent of the Provincial Insurance Company, and being myself in Toronto in eighteen hundred and fifty-three, I examined the boat and purchased her, she being then partially burnt. I had no arrangement with Mr. Bradshaw about that boat previous to my going to Toronto. I had her brought from Toronto to Quebec in the fall of the same year. The price was only thirteen hundred pounds. During the same fall Mr. Bradshaw, who seemed to be in all the secrets of the Government, told me he did not think I had any chance of getting the contract, as Mr. Baby would probably get it in preference to anybody else, and that, as Mr. Baby had no boats, he would likely be compelled to buy the *Advance* and the *Admiral*. The *Admiral* was the steamer that I bought in Toronto as above stated, and in fact there were no other boats fit for the purpose. He proposed that if I would give him one-half interest in the *Admiral*, which had then to be rebuilt, that he would give me what facilities I required to do so, and he would use his influence with Mr. Baby to purchase the boats. I acceded to that, seeing that I had no chance of getting the contract, and Mr. Baby purchased both boats.

"In 1854 there was a third boat wanted by Mr. Baby; at least, Mr. Bradshaw told me so, and he told me also that if I would buy the *Princess Royal* and give him one-half interest in her he would give me all the necessary facilities. The arrangement, to which I acceded, was a verbal one, and in pursuance of that arrangement I made the purchase of the *Princess Royal*. I bought the *Princess Royal* from a number of persons who were joint-owners. The transaction was closed with the Hon. John Rose, of Montreal, who was managing the business.

"Mr. Bradshaw was cognizant of the price that was to be

given and of the whole affair, but he objected to put anything in writing for fear that the paper might be mislaid and compromise him with the bank. There were various papers sent down from parties in Toronto, and I am sure I do not know where these papers are now. Mr. Bradshaw was acquainted with the price which was to be given, which was five thousand five hundred pounds. As between me and Mr. Bradshaw I was to make the payment, he furnishing me with facilities to do so; and everything was to be done in my name, so that his name should not appear. This arrangement was made between us in the bank, in his own office there."

The witness, after describing the settlement between himself and the defendant, respecting the *Admiral*, continues as follows:—

"With respect to the *Princess* we never had any settlement at all. The *Princess Royal* did not sell as expected, and running her she was sunk by a collision with the *Alliance*, in the month of August, one thousand eight hundred and fifty-four. She was raised at an expense of one thousand four hundred pounds, and brought down to Vaughan's yard, in Diamond Harbor.

"On my first interview with Mr. Bradshaw afterwards, he began to get alarmed at his connection with this boat, and asked me if I would give him a discharge from all liabilities in connection with her, which I agreed to do on certain conditions, which we agreed between ourselves, and those conditions were that he was to give me a certain amount of facilities on McDonald & Logan's paper, and if the loss on the boat turned out to be heavy, he was to relieve me in some way from those two drafts of twelve hundred and fifty pounds each on William Lindsay, of Montreal, which had been drawn to facilitate the payment of these boats. He then, at his desk, wrote out a receipt, which I signed, and I asked him for a copy of it, which he

wrote out himself and handed to me. That copy is the Plaintiffs' Exhibit, No. 6, filed at enquête now shewn to me. It is wholly in Mr. Bradshaw's handwriting."

Our judgment as to the part of the demand now under consideration must depend, in a great measure, upon the answer to be given to the question : Can we place reliance upon the evidence thus given by Wilson ? And, after giving to the whole of the proof adduced in this case due consideration, I have come to the conclusion that we cannot safely rest our judgment upon the testimony of Wilson, excepting so far as it is corroborated by other evidence, and that although it is so corroborated as to some important portions of his statement, yet that it remains without corroboration, or at any rate without sufficient corroboration in some very important particulars. The grounds upon which I have formed this estimate of Wilson's evidence are: 1st. That he is deeply interested in the matters in question in this cause. 2nd. He was an accomplice in the alleged wrongful acts now complained of, and was indeed the party who chiefly profited by those acts. 3rd. It is proved that he transferred to his sons his steamboats, in order to place them beyond the reach of his creditors, and then resisted the payment of their just claims by the means usually resorted to by persons who have more regard for what they believe to be their own interests than what they know to be the rights of others. 4th. I have carefully examined the deposition given by Wilson in the cause No. 301, Lindsay vs. Wilson, and I am constrained to say I cannot regard it as truthful evidence. Lastly. In giving his evidence in this cause, he attempted to conceal the truth with respect to the accommodation which he received from the plaintiffs since the defendant ceased to be manager, and more particularly during the pendency of this action and while he was under examination as a witness for the bank; and I may add that the fact of such accommodation having been given on a very large scale to Wilson during his examination, which extended over a period

of several months, militates against his evidence, independently of the attempt at concealment on his part.

The learned Counsel for the appellants admit that they rely upon the testimony of Wilson, "not as affording, *in itself*, evidence upon which to base a judgment against the respondents; but they maintain that, in the particulars which it was necessary for them to establish in support of their claim, that testimony *has been fully corroborated*."

It is therefore necessary to examine the corroborative evidence upon which the appellants rely, and I shall commence by referring to a very important document, namely, the release given by Wilson to the defendant, a copy of which, in the hand-writing of the defendant, is produced. It is as follows :—

"I hereby release you from any and all liability with regard to ownership and expenses incurred in relation to the steamer *Princess Royal*, now on Baldwin and Dinning's gridiron, Diamond Harbour, Quebec, and in which you were to a certain extent interested, say one half—the boat now belonging to me entirely and at my risk.

"J. WILSON.

"To J. F. BRADSHAW, Esq., Quebec.

"Quebec, Sept. 27, 1854."

This paper (in the hand-writing of the defendant) taken in connection with the other evidence, establishes beyond doubt that the defendant had, at one time, an interest in the *Princess Royal*; and in my opinion, there can be but little if indeed any doubt that he had previously been interested with Wilson in the ownership of the steamer *Admiral*.

The plaintiffs have therefore established the first proposition advanced by them, namely, that the defendant was, as stated by Wilson, "interested with him in the *Princess Royal*."

The second proposition advanced by the appellants is, "that in consequence and in furtherance of that interest, contemplated or actual, the bank funds in the charge of the defendant were advanced to Wilson." And they contend that the evidence of Wilson, in support of that statement, is also fully corroborated.

In support of this view our attention has been drawn particularly to the mode in which the payment of the price of the *Princess Royal* was made. Mr. William H. Jeffery, of the firm of H. J. Noad & Co., a witness examined for the defendant, and upon whose testimony full reliance may be placed, says: "I recollect a transaction which passed through the honorable John Rose, at Montreal, for the purchase of the *Princess Royal*. This was, I think, on the fifteenth of May, 1854. The nature of our own transaction was that we endorsed four notes of eleven hundred pounds each, signed by Wilson, payable at three, six, nine and twelve months: all these notes are dated the 15th May, 1854. There was a remittance that accompanied those notes, being the Upper Canada Bank's draft, at three days sight on Joseph Trenham, the agent of the Bank of Upper Canada, at Montreal. This remittance was for £1100. I can find no trace in our books for the payment of that draft, and therefore conclude that Mr. Wilson must have handed it to us. These notes and this remittance made the price of the boat *Princess Royal*, £5,500, so that the said John Wilson only got four notes endorsed by us of £1100 each to pay for the *Princess Royal*, and I am positive about this." We thus see that the price of the *Princess Royal* to the extent of £4400, was paid by Mr. Wilson's notes, endorsed by Noad & Co., and that the remainder of the price, £1100, was paid by a draft at three days sight bearing date the 11th May, 1854, signed by the defendant, as the manager of the Bank of Upper Canada at Quebec, upon the Montreal Branch of the same bank; and it appears that Wilson paid for that draft by a check on the Quebec Bank for £1102.15.0. Mr. Douglas

says there is nothing in the books to show that the check was presented at the Quebec Bank, but, in the Upper Canada Bank Book, called the Letter Blotter, the last item, under date May the 15th, 1854, is "J. Wilson's chk. on Q. B. £1102.15.0," that being evidently the check in question. And the same entry is repeated from day to day until the 7th day of June following, on which day, Wilson's check on the Quebec Bank was placed to the debit of Mr. Wilson's account, in the Bank of Upper Canada. From the evidence of Mr. Douglas it further appears that when the defendant accepted the check of Wilson for £1102.15.0 his account at the bank of Upper Canada was largely overdrawn. In a word the defendant gave the money of the Bank of Upper Canada to Wilson, whose account was already largely overdrawn, and received for the money which he so gave, a check on the Quebec Bank, which check he held for 22 days; and then charged it in the account between the Bank of Upper Canada and Wilson, without presenting it at the bank where it was payable.

The release already referred to establishes beyond doubt, as I have already observed, that the defendant was interested, with Wilson, in the ownership of the *Princess Royal*; and the evidence to which I have just adverted, establishes with equal certainty that the first instalment of the purchase money of that steamer was paid from funds which the defendant, as Bank Manager advanced in the unusual and irregular manner already mentioned.

It has been said that the fact of the defendant being a Bank Manager could not deprive him of the right of acquiring an interest in a steamboat, if he thought fit to do so; and that statement, in the abstract, is true. But it is also true that the defendant could not, without being guilty of a grave dereliction of duty, become associated with a customer of the bank in an enterprise to be carried on with the aid of the bank capital entrusted to his own care.

The stockholders of the bank had a right to count upon the undivided ability and zeal of their manager in the transactions between the bank and its customers. But when the defendant acquired a joint interest in the *Princess Royal* with Wilson, one of the bank customers, the bank could no longer, as regards the transactions with Wilson respecting that steamer, have the protection to which it was entitled. It is quite possible that when the defendant advanced the funds to the bank, to assist in paying for the *Princess Royal*, he may have thought that it could be no impropriety in advancing for the bank, of which he was manager, funds which he could probably have procured, without difficulty, from any other bank. But it is not the less true that the defendant committed a very great mistake in advancing, as in my opinion it is proved he did, the funds of the bank towards carrying on an enterprise in which he was himself interested. And that by so doing he violated the well established rule of law already referred to, "that no one having duties of a fiduciary character to discharge shall be allowed to enter into engagements in which he has or can have a personal interest conflicting, or which possibly may conflict, with the interests of those he is bound to protect." (1)

As is well observed by Paley, "with whatever fairness an agent may deal between himself and his employer, yet he is no longer that which his services require and his principal supposes and retains him to be; he acts not as an agent but as an umpire." The case cited by the learned counsel for the appellants from the Jurist for 1855, No. 131, and which it so happens was argued and decided whilst the transactions which now occupy our attention were being carried on, viz., in June, 1854, is a good exemplification of the rule of law to which I have adverted. In that case the defendant, Campbell, was appointed manager of a bank in London, with permission to carry on his separate

(1) Vide opinion of Lord Cranworth in *Aberdeen Railway vs. Blake*, 23 Law Times, p. 316.

trade as a merchant. In that character he dealt with the bank of which he was manager on the terms usual between bankers and their customers, and one of the points decided was that as manager of the bank "he was not entitled to grant himself the same accommodation, in respect of his separate trade, which he might obtain from an independent banker, and that in order to sustain any such transaction, it would have been necessary for the manager to show that he had brought the whole circumstances, most fairly and truly, before the directors, and that it was not enough for him to show that he had not concealed anything." In the course of the argument, Mr. Cairns, (probably the present Sir Hugh Cairns), asked: "Whether it was to be considered that his client, the manager, was not to have the same accommodation at his own bank which he might have got in any other bank of which he was the usual customer;" and Sir Page Wood, certainly one of the most distinguished of the judges of our time, at once replied: "I think that is, in fact, the whole question, and that it must be distinctly answered in the negative."

The learned vice-chancellor added: "As far as ordinary business goes he might, but as soon as there was any dealings with the banker, which required consideration, the manager was incapable of giving the question the consideration which he ought, and it was impossible for him to have any accommodation *at all*, without, at any rate, laying it most fully and fairly before the local committee."

The case in the Jurist, it may be observed, was in one important respect more favorable to the manager than the present case, because in that case, as the vice-chancellor observed, there had been no concealment on the part of the manager as all the items were entered in the books, whereas in the present case, the connection of the defendant with the *Princess Royal* was kept secret. It may be thought that the rule of law to which I have adverted is so perfectly obvious as to render quite unnecessary the

observations I have made respecting it. But, however plain it may be, I have, in the course of my own experience, known several cases in which it was violated by men of education and intelligence, without, as I believe, their being fully aware that they were doing anything that was contrary to law or inconsistent with morality ; but I may add that every violation of the rule, within my knowledge, resulted in disastrous consequences to both principal and agent.

Almost all our Banks, Railways, Gas, Mining and Telegraph Companies are joint stock concerns, conducted by officers known as Managers and Cashiers ; and it is of great importance, not only to the parties interested in those Companies, but to the community at large, that the Managers of such institutions, should be aware that they cannot legally, or with impunity, under any pretext whatever, enter into engagements which may, even by possibility, give them a personal interest conflicting with those of their employers ; and it is also of importance that the directors of such companies should be aware that they cannot, with a knowledge of the facts, allow such conduct to pass unpunished, without subjecting themselves to grave responsibility to their principals.

Returning, I may almost say, from this digression which I should hardly have deemed necessary, had it not been that acts which I deem plainly wrong, have (from an excess of zeal quite excusable) been defended as justifiable, I need hardly add that if any part of the sum of £1100 advanced by the defendant, to assist in the payment of the *Princess Royal*, had been lost to the bank, I could not have hesitated to hold the defendant personally liable ; but, fortunately for him that sum was afterwards duly paid.

The next document to which the appellants refer, as corroborating the statement of Wilson, is the letter dated the 18th January, 1855, of which the original was delivered to Mr. Bradshaw by Mr. Bignell, Notary Public.

Mr. Wilson, in his deposition, has sworn that the two drafts of £1250 each, upon Lindsay, were drawn to facilitate the payment of the boats. And the appellants rely upon the letter delivered by Bignell as strongly corroborating Wilson's statement. The learned Counsel for the respondent, on the other hand, treated that letter as being of little or no importance.

I do not regard it exactly as it is viewed by either of the parties. But though I am not prepared to give it the effect attributed to it by the bank, I nevertheless think it a very significant piece of evidence. It is as follows :

“ Quebec, 13th January, 1855.

“ DEAR SIR,—Having repeatedly asked you to put certain sums of money to my credit, which you promised to do, but which has not yet been done, I am therefore compelled to call on you formally to put the following to my credit, so as the two drafts on Mr. Lindsay may be given up to me.

“ 1st. A deposit I made of seven hundred and twenty-five pounds (£725.)

“ 2nd. An account rendered to you of forty-eight pounds, six shillings and three pence, for coals, &c., (£48 6s. 3d.)

“ 3rd. The sum of two hundred pounds (£200,) the balance on second last instalment paid to you on my account by F. Baby, on account of steamer *Admiral*, only eight hundred pounds having been put to my credit out of a check of one thousand pounds.

“ 4th The sum of one thousand pounds, (£1000,) the last instalment on the steamer *Admiral*, paid to you on my account by F. Baby, that has not been put to my credit yet, which ought to have been, as all the four instalments are.

" 5th. To immediately retire my note for five hundred pounds currency, drawn by me in my own favor, and payable on the first of July last, and no credit or consideration given therefor, but solely for your accommodation.

" I have also to notify you that the two steamers *Admiral* and *Princess Royal*, bought on joint account, shew a balance against you to 1st instant, of eighteen hundred pounds, (£1800,) not including two thousand two hundred pounds still to pay on the latter, of which you are aware.

" You will please therefore put the said sum of eighteen hundred pounds also to credit, and a detailed statement will be given to you.

" I have, in conclusion, to request your immediate attention to this matter, otherwise I will hold you liable, in your capacity of Cashier, as well as holding you personally responsible for all loss or damage I may have sustained in the premises.

" Yours truly,

" (Signed,)

J. WILSON..

" JAS. F. BRADSHAW, Esq.,

" Cashier Bank of Upper Canada.

" Certified to be a true copy.

" (Signed,)

WM. BIGNELL, N. P."

The defendant, strange to say, does not seem to have taken any notice of the letter thus delivered to him. And yet it seems to me morally certain that if the defendant had not, at one time, been interested in the steamboats therein mentioned, and if he had not felt it necessary to keep that interest as secret as possible, he could not have failed to close the doors of the bank upon Wilson, and to have handed his account, which was then considerably overdrawn, and all his running paper, to the solicitor of the bank for settlement. But however important the letter in question may be in some respects, I do not think its bearing

upon the Lindsay drafts is such as the appellants are inclined to attribute to it. Wilson, (it may be incidentally remarked) speaks in it of the interest of the defendant in the steamer *Princess Royal* as still existing, although according to the release, it had been put an end to more than three months previously. And I do not find one word in the letter in question confirmatory of Wilson's statement that the Lindsay drafts were drawn to facilitate the payments for the *Princess Royal*, or confirmatory of his other statement that the defendant, when the release was given, undertook, if the loss on the boats turned to be heavy, to relieve Wilson in some way from the Lindsay drafts. I have looked in vain through the record for any other evidence tending to confirm the statement of Wilson, that the Lindsay drafts were discounted to facilitate the payment of the *Princess Royal*. On the contrary, it seems to me established that the payments on account of the *Princess Royal* were not in any way connected with the discounting of the Lindsay drafts. That vessel was paid for by the draft of £1100 furnished by the defendant, about which so much has already been said, and by the four notes of Jeffery, Noad & Co., each for £1100. And Mr. Jeffery, in answer to the question : "whether these drafts were drawn to facilitate the payment of the *Princess Royal*, and whether the said drafts were or could have been made to make up any money which had been withdrawn from the business of John Wilson to pay for the *Princess Royal*," answered :—"I know nothing about these drafts. I have already stated that we have paid the four notes which were given for the *Princess Royal*. I never to my knowledge got any of the proceeds of the said drafts."

As to this part of the plaintiffs' demand, I shall add merely that, according to the evidence, the discounting of the Lindsay drafts was a legitimate banking transaction, and that I see no reason for supposing that the defendant would have refused to discount them, even if the *Princess Royal* had never been built. I therefore have no hesitation

in rejecting the demand of the plaintiffs, in so far as regards the Lindsay drafts of £2,500.

In considering the claim of the appellants for the other amounts alleged to have been advanced to Wilson, that is to say, for the amount of the McDonald & Logan drafts and check, and the amount of the notes of Russell, Chalmers & McGie, and in fine, the amount of Wilson's overdrawn account, it is proper to bear in mind that the release from Wilson to Bradshaw bears date in September, 1854, and that none of the advances now under consideration were made until about nine months after the date of that release. There is no reason to suppose that after the release, the defendant again became interested in steamboat property with Wilson, and it is impossible to believe that he could have done so, after the receipt of the notarial letter of January, 1855, which was delivered four months before the date of the first of the advances in question. There is, therefore, nothing in the dates of those advances tending to shew that they were made for the carrying on of any enterprise in which the defendant had a personal interest with Wilson.

The complaint of the plaintiffs, it is also to be borne in mind, is not that the defendant discounted paper, which he ought not to have discounted, in consequence of the want of credit and commercial standing of the parties to the paper. Had that been the complaint, it would have been necessary to have alleged that the credit and standing of each of the parties to the paper was not sufficient to justify the defendant in discounting it, which has not been done. The appellants had been led to believe and have alleged in their declaration that: "The defendant intending
"and contriving to promote his own private benefit and
"advantage, at the expense of his employers, embarked
"into commercial and other speculations and adventures,
"and used and applied the funds, notes and moneys of the
"said plaintiffs, then in his charge as such manager, in
"and about such speculations and adventures."

Their printed factum repeats this complaint, they say :

“ What they endeavoured to impress upon the Court below was, that the defendant, in the particular instances specified in their declaration, had abused their confidence, had embarked their moneys in matters in which he had *a personal interest*, and in so doing had committed acts wholly prohibited by law to a person occupying the position in which he stood in relation to them.”

And with reference particularly to Mackay's notes, they farther maintain that, under the circumstances disclosed, the defendant could not legally have touched the best paper in the world. If he chose to do so, he did it entirely at his own risk, and *became the principal debtor*.

The question, therefore, which the issue presents, respecting the advances to Wilson, is not as to whether the paper discounted for him was such as the defendant, as a bank manager, ought to have discounted ; but, simply as to whether that paper was discounted for the purposes or on account of any speculations or adventures in which he was personally interested. And after going over the whole of the proof with much care, I am of opinion, that the allegations of the plaintiffs in this respect have not been established, for except the statement of Wilson, I can find no evidence tending to connect any of the advances, now immediately under consideration, with the speculation respecting the purchase of the *Princess Royal*, in which the defendant is proved to have been interested, or with the speculation respecting the purchase of the *Admiral*, in which, it is more than probable, he was interested.

It may however be said that although it does not appear the moneys sought to be recovered were actually advanced for any adventure in which the defendant was personally interested, yet that it is certain, that he did acquire an interest with Wilson in the *Princess Royal*, and that it must be presumed from his silence, when he received the letter of

the 13th January, 1855, from Mr. Bignell, that he felt himself in the power of Wilson, and that the extraordinary facilities afterwards afforded to Wilson, must necessarily be attributed to the undue influence which he had acquired over the defendant.

This view of the case struck me forcibly during the argument, and even now, I am not prepared to say that it is unfounded; but upon an examination of the pleadings, I think, that under the issue between the parties, it is not necessary for us to express any decided opinion in relation to it.

And if it were necessary for us to do so, it would also be necessary for us, bearing in mind that the defendant does not appear to have been personally interested in those transactions, to consider whether the bank, by its long silence and by its numerous and extensive dealings with Wilson, since Bradshaw's resignation, ought not to be held to have acquiesced in them.

There only remains one further item to be noticed, namely, the account claimed as a balance due on notes discounted for Mr. McKay, painter, \$1615. With respect to this claim, I think it sufficient to observe that the notes in question seem to have been discounted for McKay, in the usual course of trade, and that I cannot see anything irregular or improper in the transaction. Moreover, the bank has compounded with McKay for the amount due upon the notes, and therefore cannot now look to the defendant, who, if he paid the notes, would have a right to exercise his recourse against McKay.

Having now explained my views as to each of the claims advanced by the plaintiffs, I may state, with reference to the whole case what I have said in effect with respect to particular items, namely, that I see no reason for believing that the defendant in entering into the transactions in question had any intention to wrong his principals, but

I cannot (consistently with my duty,) make that statement without adding that, whatever may have been the defendant's intentions, he acted improperly and illegally in acquiring secretly an interest in an enterprise carried on in the name of one of the customers of the bank with the aid of money furnished by the defendant as Bank Manager; for by so doing, the defendant in effect lent part of the bank money to himself. That the defendant should have committed such an error is greatly to be regretted, for it is established, beyond the possibility of doubt, that the late Mr. Bradshaw, was a man of remarkable ability and financial skill, and that he discharged his duties towards the bank, not only with untiring zeal and industry, but with great success.

As to the costs, I would allow the plaintiffs their costs in the Court below—excepting the costs of *enquete*—respecting which I would order the parties to pay their own costs respectively. And I would also order the parties to pay their own costs respectively in this Court; for if the appellants succeed as to a part of their claim, they fail for a much greater part.

AYLWIN, Justice, dissents:—Thinks bank should have judgment for full amount demanded.

The Court, &c.—Seeing that the said late James Foster Bradshaw, the defendant, acted as Cashier and Manager of the Bank of Upper Canada from the year 1851 until the year 1858, and that it was the duty of the said late James Foster Bradshaw, considering the important and confidential character of his duties as Bank Manager, so to regulate his actions and conduct that his private interest as an individual and his duty as Bank Manager should not be in conflict, and more particularly that it was the duty of the said James Foster Bradshaw not to lend or advance the funds of his principals to himself, or to any company or association of which he was member, or in which he was personally interested. Seeing that the said James Foster Bradshaw, the defendant, during the year 1858, and while

he was Manager of the Branch of the Bank of Upper Canada, at Quebec, acquired (10,278) ten thousand two hundred and seventy-three shares in the Quebec and Lake Superior Mining Company, mentioned in the pleadings in this cause, and afterwards became one of the directors of that company.

Seeing that the said defendant, as manager of the said bank, after he so became a shareholder in and one of the directors of the said Mining Company, made considerable advances from the moneys belonging to the plaintiffs, in his care, to the said Mining Company, upon which advances there was due, at the time of the institution of this action, and there is still due, two thousand two hundred and seventy-six dollars and seventy-two cents, equal to five hundred and sixty-nine pounds three shillings and seven pence.

Seeing that when the said advances were so made by the said defendant, as such manager, to the said Mining Company, their affairs, to the knowledge of the said defendant, were not in a prosperous state; that after the said advances were so made, the said defendant did not use due diligence to cause the same to be repaid to the plaintiffs; and that while the said balance was due by the said Mining Company to the said bank, he, individually, was indebted to the said Mining Company to the extent of six hundred and eight pounds eight shillings, for instalments due upon shares held by him in the said Mining Company, and that the defendant, individually, received from the said Mining Company indulgence for several years with respect to the payment of the said sum of six hundred and eight pounds eight shillings, while he, the said defendant, as Bank Manager, gave the said Mining Company indulgence with respect to the payment of the said balance of five hundred and sixty-nine pounds, three shillings and seven pence, so due by the said Mining Company to the said bank. And considering that the defendant, as Bank Manager, could

not legally lend the money of the bank, intrusted to his care, to the Mining Company, in which he was so a stockholder to a large extent, and interested as aforesaid, as he thereby created in himself an interest in conflict with his duty, which is contrary to the policy of the law.

And considering that the pretension on the part of the defendant that the plaintiffs, by reason of their not having objected to the making of the said advances when made known to them, must be deemed to have acquiesced in and sanctioned the making of the said advances, cannot be maintained, inasmuch as the Board of Directors of the said bank do not appear to have known, until a short time before the institution of the present action, that the defendant, who, as bank manager, made the said advances, was himself a holder of stock, to a large extent, in the Mining Company to which the said advances were so made, and himself indebted to the said Mining Company as aforesaid : And considering that by reason of the premises, the plaintiffs have a right to hold the defendant personally liable to them for the balance so remaining due upon the said advances, and therefore that in the judgment of the Court below, dismissing the demand of the plaintiffs for the said sum of five hundred and sixty-nine pounds three shillings and seven pence, there is error, doth, in consequence reverse the said judgment, to wit : the judgment rendered in this cause by the Superior Court at Quebec, on the fifth day of September, 1864 : And proceeding to render the judgment, which the said Court below ought to have rendered as regards the said balance of five hundred and sixty-nine pounds three shillings and seven pence currency, doth condemn the said defendants *reprenant l'instance*, to wit : Myrrha Turner Lewis, in her capacity of Tutrix of Julia Alice Bradshaw, Florence Margaret Bradshaw and Robert Connor Bradshaw, three of the minor children issue of her marriage with the said late James Foster Bradshaw, and James Lewis Bradshaw, Mary Sophia Bradshaw, Emma Catherine Bradshaw, three of the children and representatives of the said late James

Foster Bradshaw, and Myrrha Harriet Bradshaw, one of the children and representative of the said late James Foster Bradshaw, and Francis William Gowen Austin, her husband, as representing the said late James Foster Bradshaw, to pay to the said plaintiffs, the said sum of five hundred and sixty-nine pounds three shillings and seven pence, with interest from the fourteenth day of February, one thousand eight hundred and fifty-nine, until paid, and it is ordered and adjudged, that the said sum of five hundred and sixty-nine pounds three shillings and seven pence, with interest from the 14th February, 1859, shall be paid by the defendants *par reprise d'instance*, in the following proportion, that is to say: The Court doth condemn the said Myrrha Turner Lewis, in her capacity as tutrix to Julia Alice Bradshaw, Florence Margaret Bradshaw and Robert Connor Bradshaw, to pay three sevenths of the said sum of five hundred and sixty-nine pounds three shillings and seven pence, with interest as aforesaid; and doth condemn James Lewis Bradshaw, Mary Sophia Bradshaw and Emma Catherine Bradshaw, as three of the heirs and representatives of the said late James Foster Bradshaw, each to pay one seventh of the said sum of five hundred and sixty-nine pounds three shillings and seven pence, and interest as aforesaid, to the said plaintiffs, and doth condemn the said Myrrha Harriet Bradshaw, one of the heirs of the said late James Foster Bradshaw and Francis William Gowen Austin, her husband, jointly to pay another one seventh of the said sum of five hundred and sixty-nine pounds three shillings and seven pence, with interest as aforesaid; and doth condemn the said defendants *par reprise d'instance*, jointly to pay to the said plaintiffs their costs of suit in the Court below, except the costs of *enquête*; and as to the costs of *enquête*, it is ordered that the said parties shall pay their own costs respectively.

And proceeding to adjudicate upon the claim of the said plaintiffs, for the amount due by the Canada Grand Trunk

Telegraph Association, to wit: The sum of fifteen hundred and six dollars and thirty-three cents.

Considering that from the whole of the evidence adduced in this cause, it may reasonably be presumed that the object which induced the defendant to acquire the small number of shares, which he did acquire in the said company, was to secure for the said bank the account of the said company, and not the expectation of any profit that could result to him from the small interest which he so acquired in the said company, doth in consequence dismiss the demand of the plaintiffs, for the said sum of fifteen hundred and six dollars and thirty-three cents.

And as regards the claim of the plaintiffs, against the defendant, on account of advances by him made from the moneys of the bank to one John Wilson.

Seeing that according to the issue raised in this cause, the question to be determined, in relation to the said last mentioned moneys, is this, were the said advances to the said John Wilson made on account or for the purposes of speculation or advances in which the said late defendant was personally interested?

And considering that although it is clearly established that the said late defendant, in the year one thousand eight hundred and fifty-four, and while he was so in the employ of the plaintiffs as manager of the branch of their bank at Quebec, was jointly interested with the said John Wilson, in the purchase of the steamer *Princess Royal*, mentioned in the pleadings in this cause filed, and although it is also clearly established that the said late defendant improperly and illegally advanced at least eleven hundred pounds, belonging to the said bank to John Wilson, to assist in paying for the said steamer *Princess Royal*, in which the said late defendant was jointly interested with the said John Wilson, as aforesaid, yet that the said defendant cannot, under the issue raised in this cause, be held liable for any

of the said advances so made by the defendant to the said John Wilson, because the said sum of eleven hundred pounds, which was so advanced to assist in paying for the said steamer *Princess Royal*, has been subsequently repaid to the bank, and is not one of the sums claimed in this cause; and because the other sums claimed in this cause, as having been advanced to the said John Wilson, do not appear to have been so advanced on account of any speculation or adventure in which the defendant was personally interested; doth, in consequence, dismiss the demand of the plaintiffs against the defendant for the sums of money belonging to the plaintiffs advanced by the defendant to John Wilson.

And as regards the sum of sixteen hundred and fifteen dollars, claimed by the plaintiffs on the balance due on notes discounted by the defendant for one William Mackay.

Considering that the said last mentioned notes appear to have been discounted in the usual course of business, and that it does not appear that the said last mentioned notes were discounted on account or for the purposes of any speculation or adventure in which the defendant was personally interested: The Court doth dismiss the action of the plaintiffs in so far as regards the said sum of sixteen hundred and fifteen dollars.

And the Court, considering that the plaintiffs have failed to prove the material allegations of their declaration, excepting to the extent hereintofore mentioned, doth dismiss the demand of the plaintiffs for all the sums demanded by them in and by declaration in this cause filed, excepting the said sum of five hundred and sixty-nine pounds three shillings and seven pence, with interest and costs as aforesaid, which the said defendants *reprenant l'instance* are hereinbefore condemned to pay to the plaintiffs.

And the Court doth declare the attachment and seizures made in this cause, under the writ of *saisie arrêt* and writ

of *saisie arrêt simple*, therein issued, good and valid to the extent of the judgment in debt, interest and costs hereby rendered against the said defendants *en reprise d'instance*, and as regards the costs of this Court, it is ordered and adjudged, that the said parties do pay their own costs respectively, &c.

Disentiente the Honorable Mr. Justice Aylwin, from so much of the judgment as dismisses the demand respecting the claim as to John Wilson, as to the Canada Grand Trunk Telegraph Company, and as to William Mackay, and particularly with reference to the award of costs.

HOLT & IRVINE, for appellants.

STUART, Q. C., for respondent.

COUR DE CIRCUIT.—QUÉBEC.

Présent:—TASCHEREAU, Juge.

No. 981.	{	LEMIEUX.....	<i>Demandeur.</i>
		BROCHU.....	<i>Défendeur.</i>
		vs.	

Jugé:—1o. Qu'une partie n'a pas le droit d'inscrire pour audition à l'enquête et mérite pour un jour fixe, même en donnant avis à la partie opposée, à moins que ce ne soit de consentement.

2o. Qu'à défaut de tel consentement, la cause sera fixée par la cour.

Held:—1o. That a party has no right to inscribe for *enquête* and merits for a day certain, even upon giving notice to the adverse party, unless it be by consent.

2o. That, failing such consent, the case will be fixed by the Court.

Jugement rendu le 23 Novembre, 1865.

TASCHEREAU, Juge:—Plusieurs fois déjà la Cour a décidé que l'avis donné par une partie que la preuve serait entendue tel jour, n'est pas légal. Si de consentement les parties conviennent de faire preuve tel jour, alors sans aucun doute elles devront être entendues, et si tel consentement ne peut s'obtenir, la Cour devra elle-même fixer le

jour de l'audition. L'inconvénient que produirait toute décision contraire à celle de cette Cour, est trop évident pour laisser le moindre doute sur la question. Ainsi, si au jour fixé, le défendeur demandait une commission rogatoire, ainsi qu'il a été fait dans la cause actuelle, que deviendrait alors l'avis donné à cette partie que la preuve sera entendue tel jour, et de quelle utilité pourrait-il être ?

FRECHETTE, pour demandeur.

CARON, L. B., pour défendeur.

COUR SUPÉRIEURE.—QUÉBEC.

EN RÉVISION.

Présents :—BADGLEY, STUART et TASCHEREAU, Juges.

No. 2082.	{	DESSAINT DIT ST. PIERRE..... <i>Demandeur.</i>
		vs.
		LA COMPAGNIE DU GRAND TRONC DE CHEMIN DE FER DU CANADA.. <i>Défenderesse.</i>

Le demandeur poursuivait en dommages, concluant à ce qu'il lui fut payé une somme de soixante louis, et que la défenderesse fut contrainte à faire certains travaux pour empêcher tels dommages à l'avenir. Le demandeur ayant faitit se pourvut en révision.

Jugé :—Qu'en pareil cas, un dépôt de vingt piastres, au désir du statut, était suffisant, et qu'il n'y avait rien de réel dans l'action.

The plaintiff sued for damages, concluding that a sum of sixty pounds be paid him, and that the defendant be condemned to perform certain works to put an end to such damages for the future. The plaintiff's action having been dismissed he inscribed for review.

Held :—That, in a case of this description, a deposit of twenty dollars, in conformity with the statute, was sufficient, and that the action was not a real action.

Jugement rendu le 3 octobre, 1865.

L'action en la cause était en dommage, résultant, ainsi que le demandeur le prétendait, de ce que la défenderesse dans la construction de son chemin de fer, avait fait certains travaux qui avaient causé à la terre du demandeur, sur laquelle le chemin de fer passait, certains dommages, et sur ce il concluait : " À ce que par le jugement de cette " Honorable Cour, la défenderesse en cette cause soit condamnée à faire cesser les inondations sus-alléguées, à faire

“ tous les travaux nécessaires pour cette fin, et notamment
 “ à creuser, élargir et entretenir le fossé sus-mentionné sur
 “ la terre du demandeur, sous le délai que cette Cour
 “ jugera convenable, et qu'à défaut de ce faire dans le dit
 “ délai, il soit permis au dit demandeur de faire lui-même
 “ les travaux sus-mentionnés aux frais de la dite défende-
 “ resse.

“ Concluant en outre le dit demandeur à ce que la dite
 “ défenderesse soit condamnée à payer au dit demandeur
 “ la sus-dite somme de soixante louis courant, de dommages,
 “ avec intérêt et les dépens.”

L'action du demandeur ayant été renvoyée, il se pourvut en révision et déposa au désir de la 27 et 28 Vic., chap. 89, sec. 21, la somme de vingt piastres.

La défenderesse prétendit que l'action telle que portée, avec les conclusions spéciales ci-dessus rapportées, était une cause qui entraînait dans la catégorie de celles où un dépôt de quarante piastres était nécessaire, en autant que l'action, avec de pareilles conclusions, était une action réelle, et sur ce fit motion que l'inscription de la cause sur le rôle de révision fut mise de côté, déclarée de nul effet et le record remis à la Cour Supérieure pour le district de Kamouraska, où la cause avait originé.

Les parties ayant été entendues sur cette motion, la Cour de Révision déclara le dépôt suffisant et par conséquent renvoya la motion de la défenderesse.

ROUTHIER, pour le demandeur.

LELIEVRE, Q. C., pour la défenderesse.

COUR SUPÉRIEURE.—MONTREAL.

Présent :—MONK, Juge.

No. 2308. {	MELOCHE.....		<i>Demandeur.</i>
		vs.	
	HAINAULT.....		<i>Défendeur.</i>
		et	
	BARRÉ.....		<i>Opposant.</i>
	et		
	NICHOLSON		<i>Opposant.</i>

Jugé :—Que le vendeur d'une barge du port de plus de quinze tonneaux, ne peut réclamer, par privilège, sur les deniers provenant de la vente par exécution de cette barge, la balance qui lui reste due sur le prix de vente.

Held :—That the vendor of a barge not exceeding fifteen tons, cannot claim, by privilege, on the moneys arising from the judicial sale of the said barge, the balance still due to him on the price of sale.

Jugement rendu le 30 décembre, 1865.

Le 16 mars, 1865, un bref d'exécution fut décerné contre les meubles du défendeur à la poursuite du demandeur, et on saisit comme à lui appartenant la barge *Leclair*, qui fut vendue, et la somme de \$302.17, produit de cette vente, fut rapportée par le shérif.

Plusieurs oppositions afin de conserver produites, alléguèrent la déconfiture du défendeur, en sorte qu'il fallut appeler les créanciers.

Le 30 octobre, 1865, le protonotaire déposa son rapport de distribution qui, après collocation des frais privilégiés, contenait l'item suivant :

“ 7. A l'opposant, Louis Barré, en déduction de sa réclamation, au montant de \$811.60, fondée sur un acte de vente de la barge *Leclair*, saisie et vendue en cette cause, consenti par lui au défendeur et passé le 17 mars, 1861, devant J. Dubreuil et son confrère, notaires, le dit Louis

" Barré, réclamant le privilège de vendeur par sa dite op-	
" position.....	\$130.87
" Frais d'opposition à M. H. Bourgoïn, écuyer ...	12.73
" Au Protonotaire.....	2.00
	<hr/>
	\$145.60"

La barge en question avait été vendue au défendeur pour le prix de douze cents piastres, et il y avait, dans l'acte de vente, stipulation que l'acquéreur ne pourrait la vendre avant d'avoir payé tout le prix.

Il ne paraissait pas que la barge en question eut jamais été enregistrée conformément aux dispositions du chapitre 41 des Statuts Refondus du Canada.

La collocation de cette créance fut contestée par Nicholson, l'un des opposants afin de conserver; il alléguait que la barge en question était un vaisseau de plus de quinze tonneaux; que la vente par Barré au défendeur n'avait pas été faite suivant les lois du pays, le certificat de propriété, non plus que le certificat du constructeur, n'étant pas allégués, et que l'acte de vente n'avait pas été enregistré dans les livres du bureau de douane à Montréal; que par le droit commun un vendeur de navire n'a pas de privilège sur les produits de la vente, (1) et qu'en supposant que ce privilège eut été reconnu par le droit commun, le statut concernant l'enregistrement des navires et des hypothèques sur iceux, y avait dérogé; que la barge n'était plus dans le même état, ayant été considérablement et essentiellement réparée et changée; qu'enfin le défendeur l'avait possédée comme propriétaire et en qualité de marchand, et que, plus de six mois avant la vente sur exécution, le défendeur était en déconfiture, et que, suivant l'acte concernant la faillite, la demande de privilège ne pouvait être exercée que dans les 15 jours de la vente.

(1) Valin, p. 247, *contra*.

Barré répondit à cette contestation que, lors même que la vente n'eut pas été revêtue des formalités requises par le statut, cette omission ne pouvait le priver de son privilège de vendeur, (1) et que l'acte de faillite de 1864, ne pouvait affecter un droit acquis en 1861.

La cause ayant été inscrite pour enquête, Nicholson n'établit pas que le défendeur fût en déconfiture avant l'exécution, et Barré, interrogé comme témoin, admit que le défendeur avait fait de grandes réparations à la barge.

La cause entendue au mérite, jugement fut rendu en faveur de Nicholson, motivé comme suit :

“ La Cour, etc.—Considérant que le dit opposant, Louis Barré, n'a pas de privilège sur les deniers prélevés en cette cause, comme il le prétend par sa dite opposition, et que son opposition est mal fondée quant à l'existence du dit privilège : La Cour maintient la dite contestation avec dépens contre le dit Louis Barré, et met de côté et annule la dite 7e collocation du dit rapport de distribution, et ordonne que le dit rapport soit modifié, et que le montant de la dite 7e collocation soit distribué au marc la livre entre le dit opposant Louis Barré, le dit Nicholson, et tous les autres opposants en cette cause non colloqués, suivant le montant de leurs créances.”

BOURGOIN, pour Barré.

GIROUARD, pour Nicholson.

(1) La section 16 du ch. 41 des Statuts Refondus du Canada, porte qu'un acte de vente de bâtiment non revêtu des formalités requises, ne transfère pas la propriété. Barré était donc resté propriétaire.

BANC DE LA REINE, } DISTRICT DE QUÉBEC.
 EN APPEL.

Présents :—DUVAL, Juge-en-Chef, AYLWIN, MEREDITH,
 DRUMMOND et MONDLET, Juges.

DELERY.....*Appelant.*
 et
 CAMPBELL, *et al.*.....*Intimés.*

Jugé :—1o. Que l'exécuteur testamentaire peut être poursuivi seul pour le recouvrement des dettes mobilières dues par le testateur.

2o. Que le devoir de l'exécuteur testamentaire, ainsi poursuivi, est de dénoncer la demande à l'héritier, s'il y a doute, afin qu'il l'admette ou la conteste.

Held :—1o. That the testamentary executor may be sued alone for the recovery of the *dettes mobilières* of the testator.

2o. That the duty of the testamentary executor, thus sued, is to notify the heir of the demand, if there be any doubt, so that he may admit or contest it.

Jugement rendu le 20 Septembre, 1865.

L'action en cour de première instance avait été portée par l'appelant contre les intimés, en leur qualité d'exécuteurs testamentaires de feu G. M. Douglas, et comme tels en possession de sa succession, pour la restitution de certains morceaux d'or natif, prêtés au dit feu G. M. Douglas comme échantillons des mines d'or de Rigaud-Vaudreuil. L'appelant, par ses conclusions, demandait que les intimés, en leur qualité d'exécuteurs testamentaires, et vu leur possession susdite, fussent condamnés à lui rendre et restituer les dits morceaux d'or natif, ou à en payer la valeur, savoir : cent louis courant.

A cette action les intimés répondirent par quatre différents plaidoyers, savoir : exceptions temporaire et perpétuelle—défenses au fonds en fait et en droit.

Dans tous ces plaidoyers, et principalement dans la défense au fonds en droit, les intimés prétendirent que l'action de l'appelant aurait dû être dirigée contre les héritiers du dit feu G. M. Douglas, aussi bien que contre les intimés ; les raisons à l'appui de la défense au fonds en droit étaient comme suit :

1st. Because the said action was directed against the

respondents alone in their quality of executors of the last will and testament of the late George Mellis Douglas, and his personal representatives should also have been made parties to the said action.

2nd. Because the said respondents had no capacity, *qualité légale*, to defend the said action, and could not be compelled to plead thereto, except in the presence of and by the co-operation of the said representatives of the said late George Mellis Douglas.

La cause ayant été inscrite pour audition sur la défense au fonds en droit, l'appelant demanda par motion que, vu le refus des intimés de répondre à l'action de l'appelant en l'absence des héritiers, il lui fut permis de mettre lui-même les héritiers en cause. Les parties ayant été entendues, tant sur cette motion que sur la défense au fonds en droit, la Cour Supérieure, le 5 février, 1865, rendit le jugement suivant :

“ La Cour ayant entendu les parties en droit sur les plaidoyers, savoir : sur le mérite de la défense au fonds en droit, et aussi sur la motion du demandeur pour permission de mettre en cause les héritiers et légataires universels de feu George Mellis Douglas ; considérant que le demandeur n'a aucun droit d'action contre les défendeurs en leur qualité d'Exécuteurs-Testamentaires de feu George Mellis Douglas, et que sans au moins alléguer que les dits Exécuteurs sont chargés par le Testament du dit George Mellis Douglas de payer les dettes du défunt, le demandeur ne peut, à cet étage de la cause, mettre en cause les héritiers légaux du dit George Mellis Douglas ; renvoie la motion du dit demandeur avec dépens ; de plus, renvoie également l'action du demandeur avec dépens, quant à présent et sauf à se pourvoir contre qui de droit.”

C'est de ce jugement qu'était appel.

TASCHEREAU, H. E., pour l'appelant.—L'appelant soumet respectueusement que ce jugement est contraire à la loi, et il soumet à l'examen de cette Cour les trois propositions suivantes, qui renferment, selon lui, la doctrine des Jurisconsultes anciens et modernes sur ce point :

1° L'action de l'appelant, *actio commodati directa*, est une action personnelle ;

2° L'Exécuteur-Testamentaire peut être poursuivi seul pour le recouvrement des dettes mobilières dues par le défunt qu'il représente ;

3° Le devoir de l'Exécuteur-Testamentaire, en ce cas, est de dénoncer la demande aux héritiers, s'il y a des doutes, afin qu'ils l'admettent ou la contestent.

La première proposition énoncée ci-dessus ne souffre aucune difficulté. C'est une de ces vérités élémentaires qui n'exigent aucune démonstration. Un fait non moins évident, c'est que la dette réclamée des intimés est une dette *mobilière, claire et liquide*. L'appelant allègue dans son action que le défunt lui-même, G. M. Douglas, a constaté le prêt par lui allégué dans un reçu signé par lui, établissant la valeur de ces morceaux d'or. La seule question qui pouvait donc s'élever dans cette cause, était de savoir si la signature apposée au reçu était celle de G. M. Douglas. Il ne peut donc pas y avoir de dette qui soit plus claire et liquide que celle de l'appelant ; il n'y a pas de différence à cet égard entre un billet promissoire et le reçu allégué par l'appelant. De plus, cette signature était familière aux intimés, et il n'y avait pour eux aucun danger quelconque, aucune responsabilité à encourir, en reconnaissant et en payant une dette aussi bien constatée.

2me Proposition.—Cette seconde proposition n'est pas moins facile à établir. Tous les auteurs anciens et modernes décident unanimement que les Exécuteurs-Testamentaires peuvent être poursuivis pour le recouvrement des dettes

mobilières du défunt,—que si ces dettes sont claires et liquides et du nombre de celles qui ne souffrent pas de contestation, comme celle de l'appelant, les Exécuteurs-Testamentaires peuvent payer de suite, mais que si les réclamations paraissent douteuses, alors ils doivent, comme dit Pothier, dénoncer la demande aux héritiers afin qu'ils l'admettent ou la contestent. (1).

Troisième proposition.—Les autorités déjà citées servent aussi à démontrer la proposition énoncée ici par l'appelant. Néanmoins, il croit devoir en ajouter quelques-unes : *Pandectes Françaises*, vol. 9, page 380 : “*Il doit néanmoins (l'exécuteur,) obtenir le consentement de l'héritier et lui dénoncer les demandes qui peuvent être formées contre lui; car sans cela cet héritier pourrait prétendre qu'il avait de bons moyens pour se soustraire au paiement demandé, et refuser, ou du moins contester, l'allocation des sommes payées.*” (2)

ANDREWS, for respondent :—The principal question submitted to the consideration of the Court is whether the Court below erred in its adjudication upon the respondent's demurrer.

The question is in effect this, does an action at the instance of a creditor of the testator lie against a testamentary executor alone, that is, without the heirs being made parties to the suit, where, by the will, the executor has not been charged with the payment of the debt of the deceased ?

(1) Ferrière, *Dict. de Droit*, vbo. Exécuteur, p. 571 :—Bacquet, *Tr. des Droits de Justice*, p. 778 :—1er. Loisel, lib. 2, t. 4 règle, 15 :—1er. Arrêtés de Lamoignon, p. 313, § 14 :—Code Civil du B. C., lib. 3, p. 171 :—9 *Pandectes Françaises*, No. 380 :—4 *Marcadé* p. 109, No. 156, (bis) :—2 *Pigeau*, pp. 391 et 392 :—Ferrière, *Institutes Coutumières*, lib. 3, t. 6, art. 104 :—Pothier, *Don. et Test.* ch. 5, sect. 3, art. 1er. § 1er, p. 372 :—1813, No. 53, *Langlois vs. Dénéchaud* :—1850, No. 1677, *Parent vs. Langlois* :—1856, *Galarneau vs. Bitner* :—1858, No. 900, *Dérousselle vs. Lelièvre*, 2e ser. :—1859, No. 1888, *Russell vs. Moss*.

(2) *Dict. de Droit*, Ferrière, vbo. Ex. Test. p. 571 :—Poth., *Don. et Test.*, p. 572 :—4 *Marcadé*, p. 109, § 156 :—9 *Duranton*, No. 413.

The learned Judge of the Court below had by a previous decision given in a case brought before him, held that an action could not be maintained at the suit of a creditor of the testator against an executor alone, even where he had been by the will directly charged with the liquidation of the debts, but that the heirs or other personal representatives must, notwithstanding that clause in the testament, be made parties to the suit. (1)

The constant jurisprudence in Lower Canada has been that if a testator direct his debts to be paid by his executor, an action can be supported against the latter by a creditor of the deceased for the recovery of a *dette mobilière*, but it is believed such has not been the case where the executor had not been charged with the payment of the testator's debts.

Pothier indeed says the action would lie against the executor in his quality of executor whether he is or is not charged by the will with the payment of the debts, because it is to be presumed the testator intended the executor should pay them, and therefore the direction to do so is to be understood, *sous entendu*, in every will. On the other hand Marcadé (Vol. 4, page 109) contends that the executor, as executor, is never bound to pay the debts, but is so as having the *saisine* of the estate of the deceased, where the law gives it to him. Now it can only be for one or other of these reasons that he can be liable, that is, because he is charged either expressly or tacitly with the liquidation of the debts, or by reason that the law gives him the *saisine* of the debtor's estate.

The rulings of the Court here have hitherto been in conformity to these authors, namely, that if a testator direct his executor to pay the debts, a creditor of a debt *mobiliaire* can support an action against the latter.

(1) Caspar vs. Hunter:—1 Argou, p. 417 :—4 Grand Coutumier de Ferrière, p. 284, § 18 :—2 Pigeau, pp. 391, 508 :—Ferrière, Dict. de Droit, vbo. Ex. Test. p. 571.

MONDELET, Juge, *dissentiente* :—L'action en cour de première instance était dirigée par le seul et unique héritier de feu Charles Joseph Chaussegros de Léry, contre les exécuteurs testamentaires de feu G. M. Douglas, aux fins de les faire condamner à lui restituer, sous huit jours, des morceaux d'or natif que lui avait prêtés son frère, le dit C. J. Chaussegros de Léry, comme échantillons des mines d'or de la seigneurie de Rigaud-Vaudrenil, où ils avaient été trouvés.

Cette action fut rencontrée par quatre plaidoyers, et entre autres, par une défense en droit par laquelle les défendeurs prétendirent qu'attendu qu'il n'est pas allégué par le demandeur, dans sa déclaration, que le dit feu G. M. Douglas avait chargé, par son testament, ses exécuteurs testamentaires de payer ses dettes, ces derniers ne sont pas passibles de l'action ainsi intentée contre eux.

Les parties ayant été entendues sur cette défense en droit, la Cour a débouté l'action et en même temps renvoyé la motion du demandeur pour permission de mettre en cause les héritiers du dit G. M. Douglas. (1)

Je suis d'avis que le jugement est bien fondé. L'action est mal intentée contre les exécuteurs testamentaires, que l'on n'allègue pas être chargés de payer les dettes du défunt. Cela posé, il ne pouvait y avoir lieu de mettre en cause les héritiers et légataires universels, contre lesquels il devient nécessaire d'intenter une action.

Le jugement dont est appel devrait donc être confirmé. Il va être infirmé par la majorité de la Cour.

MEREDITH, Justice :—The question raised in this case, was fully argued in the Superior Court about fourteen years ago, in the case of Parent vs. Langlois.

At that time, having then been but a short time in this

(1) *Vide Supra*, p. 55.

district, I was not familiar with the practice here; but from a note which I *then* made, I find I was informed by the Chief-Justice of the Superior Court, and by the Chief-Justice of this Court, then a Judge of the Superior Court, that it had been the constant practice of the Courts in this district to allow actions for personal debts against executors; and after a very careful examination of the authorities on the subject, (which I admit are conflicting) I came to the conclusion that the established jurisprudence was justified by the authorities; and that if the question had to be decided upon general principles, irrespective of authorities, that it ought to be decided in the same way. Accordingly, in the case just mentioned, (Parent vs. Langlois) the action was maintained against the executors, although the plaintiff had omitted in the declaration to allege that the will empowered the executors to pay the debts. Upon further consideration of the subject, the judgment thus rendered seems to me to be right in principle.

The creditors of an estate have plainly a right to urge their claims against the persons in actual possession of assets liable for such claims. Under the custom of Paris, executors are seized of the whole of the personal estate of the deceased, and therefore the creditors have a right to look to the executors for the payment of the personal debts; subject always to the right of the executors to call in the heirs or universal legatees, if the executors think it necessary for their own protection, or for the interest of the heirs or legatees to do so.

This is the view taken of the subject by Marcadé, one of the most judicious commentators upon the Code. After saying that the testamentary executors as such are not bound to pay the debts of the estate, the author adds:

“ Quoique l'exécuteur-testamentaire ne soit jamais tenu
 “ à ce titre de payer les dettes du défunt, il peut, en fait,
 “ quand il a la saisine, être attaqué par les créanciers héréditaires.”

“ditaires comme détenteur des meubles de la succession,
 “puisque ces créanciers peuvent tout aussi bien exercer
 “leurs poursuites sur les meubles que sur les immeubles.
 “L'exécuteur, dans ce cas, ne devra payer que du consentement de l'héritier ou *par ordre de la justice*, pour éviter
 “les difficultés lors de la reddition de son compte. Il en
 “est autrement des dettes auxquelles sa propre administration donne lieu.” (1)

The rule laid down by Macardé, and which this Court is about to act upon, seems advantageous to all parties, as tending to avoid unnecessary trouble and expense.

According to that rule, the creditors look to the persons actually seized of the personal estate of the deceased. If the liability sought to be enforced against the estate admit of any doubt, the executors, as the guardians of the estate, have a right to call in, and are in duty bound to call in the heirs or legatees. In this way, the presence of the heirs or legatees is secured when it is necessary; and the trouble and expense and delay of calling them in when unnecessary is avoided; whereas, under the opposite system, the heirs or legatees would have to be called in, in every case, although, in order to avoid expense, they might be willing to leave the settlement of the estate to the executors.

If it be said that the executors may omit to call in the heirs or legatees, the answer is that the executors are the guardians of the estate appointed by the testator; and it cannot be presumed that they will neglect their duty.

Moreover, their own interest would be a strong protection against the neglect of their duty in this respect.

A distinction is made by some authors between cases when the testator orders his executors to pay his debts, and those in which he does not do so. But that distinction seems to me unfounded.

(1) 4 Macardé, p. 114.

Every testator must be presumed to intend that his just debts shall be paid. Moreover it would be wrong to make the rights of creditors depend, not upon their contracts, nor upon the law, but upon the will, or rather upon the form of the will, of their debtor.

I do not think it necessary in this case to review the authorities on this subject. They have been collected and placed before us with much care by the parties,—and all that remains for us to do,—is to express our opinion as we have done, upon those authorities and upon the reasons upon which they are founded.

It is however satisfactory to me, to find that the doctrine acted upon by the Superior Court in *Parent vs. Langlois*, and upon which we now act, is in accordance with the provisions of our own Code. which has just received the sanction of the Legislature. The article 171 of Title 2, Book 3, contains the following provision : “ The testamentary executor pays the debts and discharges the particular legacies, with the consent of the heir or legatee who receives the succession, or after calling in such heir or legatee with the authorisation of the Court
.....
..... “ He may be sued for what-
“ ever falls within the scope of his duties, saving his right
“ to call in the heir or the legatee.”

Whatever doubts may heretofore have existed as to the question under consideration, it is, I think, sufficiently plain that, under the provisions of this article, a testamentary executor may be sued for a debt due by the testator, and that it is the duty of the executor to call in the heir or legatee when that is necessary.

For these reasons I agree with the chief-justice and my brethren Aylwin and Drummond—in thinking that the judgment dismissing the action of the appellant against the respondents as executors must be reversed.

The Court, &c.—Considering that according to the allegations contained in the declaration of the appellant, he was a creditor of the late George M. Douglas at the time of his death, and that as such creditor, he, the appellant, had a right to enforce his claim against the whole of the estate of the said George M. Douglas, including the moveable property forming part thereof: And considering that upon the death of the said George M. Douglas, the respondents, as the executors of his last will and testament, became seized of the moveable property belonging to his estate and so subject to the payment of the claim of the appellant as aforesaid: And considering that the appellant had a right to enforce his said claim against the said moveable property, by action against the respondents as the persons legally seized thereof, and therefore, that in the judgment of the Court below, maintaining the *défense au fonds en droit* filed by the respondents and dismissing the action of the appellant, there is error: And, as regards the motion of the said appellant to be permitted to make the heirs and universal legatees of the said George M. Douglas parties in the said action: Considering that although the said respondents had a right, at their own diligence, to have the said heirs and universal legatees of the said late George M. Douglas made parties to the said action, and although the said appellant was not bound so to do, yet that the appellant may have an interest in causing the said heirs and universal legatees of the said George M. Douglas to be made parties in the said cause, and that there is no legal objection to their doing so, if they think fit; doth, in consequence, reverse the judgment rendered by the Superior Court, at Quebec, on the fourth day of February, one thousand eight hundred and sixty-five, and proceeding to render the judgment which the Court below ought to have rendered in the premises, doth grant the said motion of the said appellant praying to be permitted to make the said heirs and universal legatees of the said late G. M. Douglas parties in the said action: and doth dismiss the *défense au fonds en droit* of the said respondents in this cause filed, and

both order the parties to proceed to the adduction of evidence upon the other issues in this cause raised.

TASCHEREAU & BLANCHET, for appellant.
ANDREWS & ANDREWS, for respondents.

BANC DE LA REINE, } DISTRICT DE MONTREAL.
EN APPEL.

Présents:—DUVAL, Juge-en-Chef, AYLWIN, DRUMMOND et
MONDELET, Juges.

LE PRO. GENL. *pro* REGINA..... *Appelant.*
et

ELLICE..... *Intimé.*

<p>Jugé:—Qu'il y a appel à la Cour du Banc de la Reine, des décisions en Cour Supérieure, sur révision des sentences des arbitres provinciaux.</p>	<p>Held:—That there is an appeal to the Court of Queen's Bench, from decisions of the Superior Court, upon review of orders of the provincial arbitrators.</p>
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Jugement rendu le 7 juin, 1865.

L'intimé en cette cause ayant fait au gouvernement de cette province une demande en dommages, qu'il alléguait lui avoir été causés par certains travaux faits à ou près du Canal de Beauharnais, vit sa demande renvoyée par les arbitres provinciaux. Se prévalant des dispositions du Statut de la 22 Vict., cap. 3, sec. 60, il appela de cette décision à la Cour Supérieure, qui, en renversant la décision des arbitres, accorda à l'intimé une somme de £8,575. Le procureur-général, au nom de Sa Majesté, se pourvut devant la Cour du Banc de la Reine en appel pour faire réformer ce jugement. Par une exception préliminaire, l'intimé prétendit que le jugement de la Cour Supérieure était en dernier ressort, et que le statut ne déclarant pas qu'il y avait recours contre ce jugement, ce dernier était final. L'intimé demandait en conséquence le débouté de l'appel.

Les parties ayant été entendues, la Cour du Banc de la Reine, siégeant en appel, rendit le jugement suivant:

This cause being called for hearing on the exception *préliminaire* filed by the respondent, both parties are heard thereon by their counsel respectively : and the Court doth reject the said exception *préliminaire* filed by the respondent, with costs.

HON. G. E. CARTIER, *pro Regid.*

ROBERTSON, A. & W., pour l'intimé.

BANC DE LA REINE, } DISTRICT DE MONTRÉAL.
EN APPEL.

Présents :—DUVAL, Juge-en-Chef, AYLWIN, DRUMMOND
et MONDELET, Juges.

MORRISON *et al.*.....*Appellants.*
et

DUCHARME.....*Intimé.*

Jugé :—Qu'après la réception d'ouvrages de construction d'une église, etc., ceux qui les ont fait construire ne peuvent se plaindre des déficiences qui s'y rencontrent, qui ne dépendent pas des vices du sol, à moins qu'il n'y ait dol ou surprise.

Held :—That after the acceptance of certain works about the building of a church, &c., those who have caused the building thereof cannot complain of the defects therein, that do not result from defects of the ground, *vices du sol*, unless there be fraud or deception.

Jugement rendu le 8 septembre, 1865.

Le jugement dont était appel avait été rendu en Cour Supérieure, à Montréal, en faveur de l'intimé, le 30 avril, 1864.

Les appelants, syndics dûment élus pour surveiller la construction d'une église et d'une sacristie, en la paroisse de St. Gabriel de Brandon, firent acte de marché avec l'intimé, le 29 mars, 1855, et l'intimé entreprit d'ériger ces bâties conformément au dévis annexé au marché, et de les livrer complètes et parachevées le 25 décembre, 1856, à dire d'experts. Le prix fut fixé à la somme de £1893 10s., cours actuel, que les syndics devaient payer à l'intimé aux différentes époques mentionnées au marché.

Par acte passé le 31 décembre, 1855, les parties ratifièrent l'acte de marché, mais prolongèrent d'une année le délai fixé originairement pour la livraison des bâtisses, et pour le paiement des différents termes du prix convenu.

Le 25 août, 1858, les travaux étant terminés, des experts furent nommés par les syndics et par l'entrepreneur, pour en faire l'examen, et, sur le rapport, les syndics déclarèrent et reconnurent, par acte authentique dressé à cet effet par M^{re}. Piché, et son confrère, notaires, accepter et recevoir l'église et la sacristie, et quitter et décharger l'entrepreneur de toutes obligations qu'il avait contractées envers eux par le dit marché, sans cependant le décharger de la garantie de dix ans; et comme l'entrepreneur avait, à la demande des syndics, réduit la hauteur des murs de l'église d'environ trois pieds, il fut convenu à l'amiable qu'il y aurait déduction de £75 sur le prix du marché.

Après avoir pris possession des ouvrages, les syndics ayant cessé de faire leurs paiements, l'intimé institua une action contre eux, le 10 de juin, 1863, pour deux termes, formant £306 courant.

Les appelants plaidèrent à l'action par deux *exceptions*, dont les allégations étaient absolument les mêmes, mais dont les conclusions seules différaient. Ils se plaignaient de la manière dont les ouvrages avaient été faits, et prétendaient, qu'après la livraison de l'église et de la sacristie, ils avaient découvert des vices qui mettaient en péril ces bâtisses; que l'eau et la neige s'introduisaient à travers la couverture de l'église et de la sacristie; que les murs en briques se dégradèrent et se détérioraient considérablement; qu'un des murs de la sacristie étaient sur le point de tomber; que le portail de l'église travaillait; que les portes et les châssis n'étaient pas clos de manière à mettre les dites bâtisses à l'abri des intempéries des saisons; que ces défauts de construction provenaient des vices de l'ouvrage et des vices du sol; enfin, qu'en exécutant le dit marché, le dit

entrepreneur ne s'était pas conformé aux règles de l'art et aux lois du pays. Ils invoquaient ensuite leur défaut de qualité, et alléguaient qu'il ne pouvaient être poursuivis personnellement, vu qu'ils formaient une corporation et un corps politique, et que l'action était illégalement dirigée contre eux.

Les conclusions de la *première exception* étaient purement et simplement que l'action fut déboutée ; tandis que celles de la *seconde exception* étaient que les appelants ayant souffert des dommages de £2000, par suite des dits vices de construction, cette somme devait être portée comme compensation de tout montant que l'intimé pourrait établir lui être dû.

Par ses *réponses aux exceptions*, l'intimé maintint qu'il avait fait ses ouvrages d'une manière irréprochable ; que s'il y avait quelque défectuosité dans la partie du fond de la sacristie, il n'en était pas responsable, car c'était les syndics eux-mêmes, qui, malgré ses protestations, avaient fait construire une allonge de dix pieds à la dite sacristie ; que les quelques détériorations qui pouvaient se rencontrer dans ces bâtisses avaient été causées par l'intempérie des saisons et l'effet du temps, et étaient indépendantes de la qualité des ouvrages ; que de plus, les syndics, au printemps de 1859, avaient fait élever, sans précautions, et d'une manière inhabile, dans le clocher de la dite église, une cloche dont le poids et la forme ne convenaient nullement à une bâtisse de ce genre, et qui en avaient ébranlé le portail ; aussi que, peu de temps après, ils l'avaient fait enlever pour lui en substituer une plus convenable ; que les syndics avaient reconnu souvent que l'intimé avait parfaitement rempli ses engagements, en lui payant des sommes à compte, jusqu'au 15 mai, 1861, et en lui promettant, tant verbalement que par lettres missives, de le payer en entier ; que trois ans après la livraison des bâtisses, en avril, 1861, les syndics et le curé de la paroisse avaient donné à l'intimé un certificat reconnaissant que les dits ouvrages *étaient d'une construction solide et durable, et que les connaissances du demandeur dans*

l'architecture ou la construction d'églises, et sa probité, étaient une assurance du succès et de la bonté des ouvrages soumis à son exécution.

Une enquête fut instruite sur ces prétentions adverses, et le 30 avril, 1864, intervint le jugement suivant :

SMITH, Justice :—"The Court, &c.—Considering that the
 " said plaintiff hath proved the material allegations of his said
 " action, and that the said defendants are justly and truly
 " indebted to the said plaintiff in the amount claimed by
 " this action ; and further considering that the said defen-
 " dants have failed to allege or establish, in any way, any
 " right to have or maintain the conclusions taken by their
 " said *Exceptions*, or to bar the rights of the said plaintiff to
 " recover the amount so due and owing to him as aforesaid ;
 " and further considering that the said defendants did, on
 " the 25th day of August, in the year 1858, receive the
 " work undertaken to be done by the said plaintiff, and
 " did accept the same and completely discharge and exone-
 " rate the said plaintiff from all liability by reason of the said
 " undertaking, save and except from such liability as would
 " attach by law against him as such architect and under-
 " taker, and this after a full and complete examination of
 " the work so done and completed by the plaintiff ; and fur-
 " ther considering that the said defendants did, before the
 " institution of the present action, fully acknowledge that
 " the work was so done in a complete, skilful and work-
 " man like manner, and that the same was in all respects suffi-
 " cient and according to the said contract, and this by letters
 " written to the said plaintiff by the said defendants and on
 " their behalf, and long after the said work had been ac-
 " cepted and fully completed and finished ; and further
 " considering that the said defendants have not alleged or
 " proved that any surprise was practised on the said defen-
 " dants, and that they were hindered from making a com-
 " plete examination before accepting such work and writ-
 " ing such letters, and that there existed any secret or

"latent defects which could not have been discovered at the time of the examination of the said work and of its acceptance aforesaid; and further considering that the said defendants have failed to prove the existence of any *vice du sol* or of *construction* for which the said plaintiff could be held liable as such architect or undertaker, falling within the reserve stipulated by the defendants at the time of the acceptance of the said work and of the discharge given to the said plaintiff by reason thereof, but on the contrary that the weight of testimony is in this particular in favor of the said plaintiff: The Court doth overrule the *Exceptions* pleaded by the said defendants, and doth condemn the said defendants, in their said quality, to pay the plaintiff the sum of three hundred and six pounds, &c., &c."

MONDELET, Juge :— Les difficultés suscitées par les appelants, défendeurs, à l'intimé, demandeur, qui réclamait ce qu'il alléguait lui être dû sur les constructions par lui faites à l'Eglise de St. Gabriel de Brandon, sont, à mon avis, de très mauvaises chicanes. Il me paraît prouvé que l'intimé a fait de bon ouvrage, et que les *craques* ou fissures qui sont survenues depuis la confection de ces ouvrages, lesquels ont, d'ailleurs, été acceptés et reçus par les appelants comme syndics, sont de peu de conséquence, sous plusieurs points, et que d'autres ont été le résultat de la négligence à réparer ce que le mauvais temps ne manque jamais, ou rarement de produire. Quant à ce qu'on prétend à l'égard de la séparation du comble et du portail, la cause en a été le placement imparfait d'une cloche qui ne convenait pas au clocher, mise et sonnée sur le long, au lieu de l'être sur le travers de l'Eglise qu'elle ébranlait, et qu'il a fallu, après une dizaine de jours d'épreuve, remplacer par deux autres cloches plus petites.

Je crois que la cause principale du procès peut facilement se tracer à la conduite indiscreète, violente même, du curé Turcotte, dont la disposition exagérée décèle assez

l'esprit dont il était animé lorsqu'il a été examiné comme témoin.

Le jugement dont on a appelé me paraît bien fondé, et je pense que nous devons le confirmer.

Jugement confirmé.

LAFRENAYE et ARMSTRONG, pour les appelants.

ROY, pour l'intimé.

SUPERIOR COURT.—QUEBEC.

Before :—STUART, Justice.

No. 136.	{	YOUNG.....	Plaintiff.
		BALDWIN.....	Defendant.

vs.

Held :—That payment of costs to an attorney *ad litem*, who had not obtained *distriction de dépens*, and who had no special authority to receive them, is nevertheless valid.

Jugé :—Que le paiement de dépens à un procureur *ad litem*, qui n'avait pas obtenu *distriction de dépens*, et qui n'avait aucune autorité spéciale pour les recevoir, est néanmoins valable.

Judgment rendered the 9th day of October, 1865.

The action in the cause was instituted for the recovery of seven thousand dollars, alleged to be due by the defendant to the plaintiff, representing the late firm of G. B. Symes & Co., for a like sum and interest, lent by the said firm of G. B. Symes & Co. to the defendant.

To this action the defendant pleaded the general issue, and by temporary exception : “ That, previous to the institution of the present action, the plaintiff had impleaded the defendant for the same cause of action as that in the present case, which former suit under the provisions of the Chapter 82, Consolidated Statutes for Lower-Canada, had been withdrawn by the plaintiff subject to the payment of his the defendant's costs. That these costs although duly

taxed, had never been paid to the defendant; he therefore concluded for the dismissal of the action, *quant à présent*."

The same objection, together with a plea of prescription, was also taken by the defendant in his plea of perpetual exception.

The plaintiff demurred to the first count of the defendant's perpetual exception, on the ground that the non-payment of costs on a former action, could only be made the matter of a temporary exception, but could not be set up by perpetual exception to the plaintiff's action.

A special answer to the defendant's plea of temporary exception, was also produced by the plaintiff, in which he alleged as follows: "That, before the institution of this action, the plaintiff did well and duly pay to the defendant, to wit: to D. D. O'Meara, Esq., his attorney *ad litem* in the said suit or action, the sum of twenty-four dollars and twenty-three cents, being the costs incurred in the said suit, and which sum the said attorney *ad litem* received in satisfaction and payment of the defendant's costs in the said action."

The defendant encountered the plaintiff's special answer to his, the defendant's plea of temporary exception by a demurrer, assigning in support thereof the following reasons:

"1° Because it is not alleged in the said special answer, that the defendant had ever authorized or empowered the said D. D. O'Meara, Esq., therein mentioned, to draw or receive the costs alleged to have been paid the said D. D. O'Meara."

"2° Because it does not appear that the said D. D. O'Meara had any special power or authority whatever by or from the defendant to receive the said costs."

"3° Because it does not appear that the said D. D.

"O'Meara, had demanded or obtained *distriction de dépens*,
 "in the suit referred to by the defendant in his plea of
 "temporary peremptory exception."

"4° Because in the absence of such demand, for *distrac-*
tion de dépens, by the said D. D. O'Meara, and the grant-
 "ing of the same, by this Honorable Court, the said plain-
 "tiff could not legally pay the said costs to the said D. D.
 "O'Meara, and the said D. D. O'Meara could not legally
 "receive the same from the said plaintiff."

"5° Because the payment of the said costs to the said
 "D. D. O'Meara, was not a valid payment, and did not and
 "does not bind the defendant, or operate as a discharge in
 "favor of the plaintiff."

Pemberton, for plaintiff, in support of the demurrer ;
 urged that an attorney *ad litem* could not receive the costs of
 an action, unless he had previously asked for and obtained
distriction de dépens, or had some special power from his
 party to that effect ; the costs of an action were the accessory
 of the principal, and were the property of the party in whose
 favor they were adjudged. There were rules laid down by
 every French writer on this subject, which had still all
 the force of law in Lower-Canada. The plaintiff in this
 instance having paid the costs to a person not authorized
 to receive them, must bear the penalty, and his action under
 the statute must be dismissed. (1)

For the plaintiff, it was contended that, although under
 the old regime, the principles laid down by the defendant
 might have prevailed, under our modern Jurisprudence,
 they did not. The Bar was constituted by statute. The

(1) Authorities cited by defendant.

Ferrière, Dict. de Droit, vbo. Procureur, § 16 :—Ancien Denisart, vbo. Dépens,
 Nos. 38 et seq. :—Ancien Denisart, vbo. Procureur, No. 65 :—Ancien Denisart, vbo.
 Distraction de Dépens :—Pothier, Procédure Civile, vol. II., ch. I., art. 6 :—Pothier,
 Mandat, No. 135 :—2 Pigeau, Procédure Civ., p. 309 :—Sirey, Code de Procédure Civ.,
 art. 133 :—Guyot, vbo. Procureur, Dépens, Distraction :—Merlin, vbo. Procureur,
 Dépens, Distraction.

powers of an attorney *ad litem* had been by custom extended to receiving the costs in suits, even without *distriction de dépens* being demanded. The costs of a suit were regarded as the fee of the attorney, to which he was of right entitled. In this case too, the attorney in the former cause, might even now come into Court and demand *distriction de dépens*, which must be granted to him.

STUART, Justice :—The demurrer must be dismissed.

Judgment.—The Court having heard the parties by their counsel respectively, *en droit*, upon the pleadings, to wit: upon the merits of the demurrer filed by the defendant to the special answer of the plaintiff, to the temporary peremptory exception, pleaded by the defendant. Considering that the said demurrer is unfounded in law, doth overrule and dismiss the same, with costs.

VANNOVOUS, for plaintiff.

PEMBERTON, for defendant.

HEARN, counsel for defendant.

QUEEN'S BENCH, } DISTRICT OF QUEBEC.
APPEAL SIDE.

Before :—AYLWIN, MEREDITH, DRUMMOND and MON-
DELET, Justices

BOWKER..... *Appellant.*

and

FENN..... *Respondent.*

- Held :—That the prescription of five years against promissory notes, is not a simple presumption of payment, but an absolute prescription which can only be interrupted by a formal acknowledgment of the debt.

Jugé :—Que la prescription de cinq ans contre les billets, n'est pas une simple présomption de paiement, mais une prescription absolue, qui ne peut être interrompue que par une reconnaissance formelle de la dette.

Judgment rendered the 9th December, 1865.

The action in the Superior Court was brought on the 16th July, 1862, for the recovery of \$391.66, as the balance

and interest due on a promissory note bearing date the 15th September, 1856, and \$56.80 on an account.

The appellant pleaded the statute of limitations to that part of the action relating to the note, as to the account, he acknowledged having received value to the amount of \$40, which had been overpaid by a remittance of \$50, which the plaintiff had improperly credited on account of the note.

In answer to these pleas, the plaintiff alleged interruption of prescription by acknowledgment to owe and promise verbally and in writing to pay, and actual payment on account. By another special answer the plaintiff alleged that the defendant was indebted to him at the date of the note, in the sum of \$346.16, for money lent and advanced, goods sold, and interest accrued, and that for such indebtedness he gave the note sued upon, which he failed to pay.

Letters written by the defendant to the plaintiff contained a general acknowledgment of indebtedness, and being examined on *faits et articles*, he admitted that, at the date of one of those letters, in 1857, he considered himself indebted to the plaintiff in the amount of the said promissory note. The plaintiff, on the 10th August, 1860, acknowledged, by a letter to the defendant, the receipt of \$50, which amount, "I have endorsed on your note," although no such endorsement appeared. The defendant answered: "Your letter acknowledging the receipt of my letter containing remittance has been received," and no objection was made to the *imputation*. The last letter, bearing date the 24th September, 1861, was the only one written after the prescription acquired.

The parties having gone to proof and been heard upon the merits, the judgment rendered in the Superior Court by Monk, Justice, condemned the defendant in the amount demanded, with interest and costs, &c.

It was from this judgment that an appeal was instituted.

ROBERTSON, Q. C., on behalf of the appellant :

1° Under our statute, the lapse of five years is an absolute bar to an action on a Promissory Note, the proviso under the 34 George III., cap. 2 : " that every debtor, " &c., shall, if required, make oath that such Promissory " Note is *bonâ fide* discharged and paid, being no longer in " force."

The Consolidated Statute of Lower-Canada, chap. 64, sec. 31, enacts that " all Notes made after the said day," (1st August, 1849,) " shall be held to be absolutely paid and discharged, if no suit or action has been brought within five years, &c.;" and this is the only statute now regulating the prescription of Notes in Lower Canada.

If our statute holds Notes " to be absolutely paid and discharged," it means that they must be taken as discharged for any balance not paid. The defendant is not now obliged to swear the note was paid, and it may fairly be held that a payment made by a debtor within the five years operates only as payment *pro tanto*, but does not amount to a promise to pay the balance. The debtor who pays part of a note, can still rely on the prescription when he invokes it, as resulting from the express language of the law. Proof of a partial payment simply establishes such payment, but ought not to be held to be " a new or continuing contract," as set forth in the language of the statute of limitations. The effect of the judgment appealed from, is to add to the statute which enacts that *all Notes* " shall be held to be absolutely paid and discharged, if no suit has been brought thereon within five years," the words " provided that an acknowledgment (in writing) or part payment of any note within the five years limited for presentation, or previous to the institution of the suit, shall take such note out of the effect of this statute."

No such language is to be found in our Promissory Note Act, which differs also essentially from the old French law, and from the Code. The ordinance of 1763 says:—"Les lettres ou billets de change seront réputés acquittés après cinq ans..... néanmoins les prétendus débiteurs sont tenus d'affirmer, s'ils en sont requis, qu'ils ne sont plus redevables."

The 186th article of the *Code de Commerce* says:—"Toutes actions relatives aux lettres de change se prescrivent par cinq ans s'il n'y a pas condamnation, ou si la dette n'a été reconnue par acte séparé. Néanmoins les prétendus débiteurs sont tenus d'affirmer, &c."

This prescription being founded on a presumption of payment, (1) the oath of payment might be required. It is submitted that under our statute the oath cannot be legally required, much less can interrogatories *sur faits et articles* or an examination of a defendant as witness, to establish a partial payment within the five years, and thereby to interrupt prescription. Pardessus (2) shews the distinction between the interruption of a prescription by an acknowledgment before the prescription was acquired. (3) Pardessus lays down a rule which may be held even more applicable under our statute as to notes than under the code, namely, that where the prescription is subordinated to the oath of the debtor, the debt subsists if the oath is not taken; but when it is without condition or *de plein droit*, the debt is extinguished by the simple lapse of time.

2° The acknowledgments relied on in the letters from the defendant to the plaintiff, do not constitute any interruption of the prescription, nor any sufficient acknowledgment to take the case out of the English or L. C. Limitation Act, supposing the latter Act to be applicable to the case of Notes.

(1) Pothier, *Change*, No. 303:—1 Pardessus, p. 483.

(2) Pardessus, pp. 491-492.

(3) Troplong, *Prescription*, Nos. 66, 613.

Only two letters can be found having direct reference to the Note, viz :

One of Feb. 6, 1857 :

"If I can only sell this land, I have no doubt that in the course of next summer, I shall get out of your debt. I shall certainly make a great effort to send you a remittance next spring."

The other of 27th July, 1860, being the letter enclosing the check for \$50 :

"To this (land) I have looked to pay off your demand." He then alludes to having been robbed of \$80, adding "this money I had put aside for you. The boy had spent it all. I never got back a farthing; now I am exceedingly anxious to get out of your debt, but if I am robbed of my property in Lima, (the land referred to) I almost despair of being able to pay you."

It is submitted that these allusions constitute neither an interruption of prescription, nor such an acknowledgment as under the statute of limitations would take the case out of the statute. There is but one letter written after the prescription acquired, it is of the 24th September, 1861, and it does not allude to the note. (1)

3^o According to the English doctrine the promise or acknowledgment should have been set up in the declaration, in order that the replication should support the declaration.

"The constant replication ever since the statute to let in evidence of an acknowledgment is that the cause of action accrued, or that the defendant made the *promise in the declaration*.

(1) "There must be an unqualified acknowledgment of the debt from which a promise can be inferred." *Ohilly, Bills*, p. 611.

"There must be proof in writing of a promise conformable to the declaration, an acknowledgment from which the Court can infer a promise to pay."—*Evans vs. Simon*, 9 Exch., 285.

ration mentioned within the six years, and the only principle upon which it can be held to be an answer to the statute is, that an acknowledgment *is evidence of a new promise, and as such constitutes a new cause of action*, and supports and establishes the promise which the declaration states. Upon this principle whenever the acknowledgment supports any of the promises *in the declaration* the plaintiff succeeds, where it does not support them, though it may shew clearly that the debt never has been paid, but is still a subsisting debt, the plaintiff fails." (1)

It was formerly held that the acknowledgment might be after action brought. But as the acknowledgment is now considered *as the ground of action and the subject of the declaration*, the promise, acknowledgment, or payment must clearly be before action brought. (2)

An acknowledgment bars the statute and amounts to a new promise, and therefore if made after action brought is no bar. In this case Lord Denman held with Lord Tenterden in *Tanner vs. Smart*, that the statute of limitation takes effect, not on a presumption that the debt was discharged, but on a new and distinct promise.

"If there be two undisputed but entirely separate debts, a part payment within six years not specifically appropriated will not as it seems bar the statute as to either." (3)

When we find in the statute (9 Geo. 4, c. 14) that nothing therein contained shall alter, or lessen the effect of any payment, &c., we have a right to suppose, inasmuch as the statute has relation to barring the creditors remedy,that the payment which is to take the case out of the statute must be expressly a payment in respect of that part of the debt, which would, but for this provision, be barred by the statute. Inasmuch therefore as there is

(1) *Tanner vs. Smart*, 6 B. & C., p. 606.

(2) *Byles on Bills*, p. 402, Am. Ed. 1853, and cases cited there.

(3) 2 *Taylor on Evidence*, sec. 997.

no evidence to shew *that the debtor* intended to apply the payment in discharge of the earlier items, such payment does not exempt those items from the operation of the statute of limitations. (1)

4° The judgment rendered on the 31st October, 1863, setting aside the Interrogatories *sur faits et articles*, is submitted as contrary to the express language of the statute.

The plaintiff who, in his declaration, declares himself to be of Rochester, in the State of New York, was served with interrogatories by the defendant at the Prothonotary's Office, under the Con. Stat. of L. C., Chap., 83, sec. 64, which enacts as follows :

“ And if any order, rule, notice or proceeding emanating from the Superior or Circuit Court, or from any Judge, or incident to any suit or proceeding in either of the said Courts, requires to be served upon any party to any cause or instance, who has left Lower Canada since the commencement of such cause or instance, or who is not domiciled in Lower Canada, the service of any such order, rule, matter or proceeding, may be lawfully made upon such party at the office of the Prothonotary, or of the Clerk of the Court, in which and at the place where such cause or instance is pending ; and the return of the Bailiff stating that he has made diligent search and has not been able to find the party, and that to the best of his belief such party is not within the limits of Lower Canada, shall be *prima facie* sufficient to establish the fact of such absence.”

The plaintiff moved “ that the interrogatories and the “ rule thereto annexed be rejected from the record in this “ cause, and that the plaintiff be declared not to have been “ in default, and that such ruling entered in reference “ thereto be reconsidered and changed accordingly.” After hearing the parties, the learned Judge (Berthelot, before

(1) Tindal, C. J., in *Mill vs. Fawkes*, 7 Scott, 452.

whom the motion was heard) granted the motion on the ground "that the signification of the rule was insufficient," stating that the clause of the statute if enforced, would lead to such injustice and delay, that, in this cause as in others, he had made up his mind not to regard a service of interrogatories, at the prothonotary's office, as a valid service.

An exception was filed to this judgment, and the question comes before this Court whether the ruling is to be sustained. It was admitted that the statute recognized as valid a service of any rule or order on absentee litigants; but it was argued that, if carried out, a party in England might be brought to Canada to answer, or might be condemned by default, on a service of which he was ignorant, and lose his case, however well founded.

The reasonableness and utility of the enactment might be established by cases well known to have happened, but it is apprehended that it is not necessary to enter upon such discussion. If the statute is clear and unambiguous, as in the present instance, it should be carried into effect, so long as it stands on the statute book. The plaintiff might have made application to be allowed to answer at Rochester, or to have funds tendered to him, by the defendant, for his expenses of travel, but it cannot fairly be held that the Judge ought to disregard the plain language and meaning of an enactment.

In the case of *Lamoureux vs. Boisseau*, decided at Montreal by Mr. Justice Monk, on the 31st May, 1864, the same point came up, as to the sufficiency of a service of interrogatories *sur faits et articles* at the *greffe*, the Judge stated "that he would follow the Jurisprudence as settled in the cases of *Fenn vs. Bowker*, and *Lacasse vs. Lacasse*, (No. 2188; Final Judgment, 30th November, 1863,) both decided by Mr. Justice Berthelot, although the words of "the statute appeared very stringent."

SNOWDON, on behalf of respondent:—1° From the first

introduction of the law of limitations in England, the principle, that an acknowledgment or a part payment takes the case out of the statute, has invariably been maintained by the Courts, although not recognized in any statute previous to 9 Geo. IV, chap. 14, and even in that not more expressly than in chap. 67 of the Consolidated Statutes for Lower Canada. (1)

2° The effect of an acknowledgment or part payment of a debt is recognized by the Consolidated Statutes of Lower Canada, as sufficient to take the case out of the statute.

"No acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the next preceding section....., unless such acknowledgment or promise is made or contained by or in some writing to be signed by the party chargeable thereby."

"But nothing in this section shall alter or take away or lessen the effect of any payment of any principal or interest made by any person whatsoever." (2)

3° As to the sufficiency of the acknowledgment, Angell says: "It must be an acknowledgment of the justice of the debt in question, so made as to amount in the eye of the law to an implied promise." (3)

"It is sufficient if it is an unqualified admission of a still subsisting liability, from which a promise to pay may be inferred by law." (4)

(1) Dwaris on Statutes, (London, 1830,) p. 943:—Angell on Limitations, p. 219.

(2) Con. Stat., Lower Canada, Chap. 67, sec. 2, sub-sec. 2.

(3) Angell on Limitations, p. 218.

(4) Chitty on Bills, p. 614:—2 Taylor on Evidence, p. 879.

Acknowledgments held sufficient in the following cases :

Frost vs. Bengough, 8 Moore, p. 180:—Colledge vs. Horn, 10 Modrè, p. 431:—

AYLWIN, Justice, dissenting.—The appellant was condemned in the Superior Court, at Montreal, for the balance of a Promissory Note, and an open account. The judgment was for \$447.82. The first plea set up by the defendant was the five year's prescription to the note, which was dated 15th September, 1856, while the action was only brought 16th July, 1862. The answer was interruption of prescription by acknowledgment both written and verbal. Examined upon *faits et articles*, the appellant admitted having written and sent the letters filed, which unqualifiedly admit the debt and promise to pay. In my opinion this does away with prescription, which is only a presumption of payment, and such a plea, not a bar to the action, but only a temporary exception. (1)

There is a complete promise to pay, and I am of opinion the judgment should be confirmed.

DRUMMOND, Justice.—Assented to the judgment with some regret, but he felt bound to obey the plain language and meaning of the statute, and not to substitute his own ideas of equity. He held that the defendant had admitted his indebtedness to the plaintiff, but still the note, under the law, must be held to be absolutely paid and discharged.

MONDELET, Justice.—The question is one of interrup-

Dodson vs. McKay, 4 N. and M. 327, sec. 6 :—Gardner vs. McMahon, 3 Q. B., 561 :—Waller vs. Lacey, 1 M. and Gr. 54 :—Taylor on Evidence, vol. 2, p. 883 :—2 Harrison's Digest, p. 1465.

As to Imputation of Payments :

Rice and Ahern, 6 Lower Canada Jurist, p. 201.—When creditor makes imputation it is complete when debtor is notified, and is binding on both parties.—Chitty on Bills, p. 403.—Simpson vs. Ingham, 2 B. and C., 65, or 3 D. & R., 249, S. C.

Effect of part payment :

2 Taylor on Evidence, p. 884 :—Angell on Limitations, p. 961 :—Walker vs. Butler, 25, L. J. Q. B., 377 :—Clarke vs. Hooper, 10 Bing., p. 480 :—Burlingh vs. Scott, 2 M. and R., 93 :—Staley vs. Barrett, 39 English L. and E. Reports, p. 367.

As the Statute of Limitations must be pleaded by the debtor, the issue as to its being barred is properly raised by an answer :

1 Chitty's Statutes, part 2, p. 703, note 2 :—2 Harrison's Digest, p. 1471 :—Leeper vs. Falton, 16 East, p. 420 :—Upton vs. Elze, 12 Moore, p. 303.

As to the interpretation of Statutes : Dwaris on Statutes, pp. 724, 725.

(1) Russell vs. Fisher, 4 L. C. Rep., 256 :—Pothier, Obl., No. 346.

tion of prescription against a note for the recovery of the balance on which an action has been brought after a lapse of 5 years, since the date the note became due and payable.

The Statute, L. C., chap. 64, sec. 31, has been pleaded by the defendant and relied upon as a bar, an absolute bar, to the action.

The plaintiff has maintained that within the five years the defendant has made acknowledgment of indebtedness, and promised to pay the balance due on the note.

Interrogatories *sur faits et articles* have been submitted to the defendant, and by him answered.

Interrogatories *sur faits et articles* submitted to the plaintiff, who is of Rochester, in the State of New York, were served in the prothonotary's office, under sec. 64, chap. 82, Consolidated Statute L. C. They were set aside by the Court.

Two questions arise :

1° Is the Statute, chap. 64, sec. 31, an absolute bar to the action, and is the note to be held absolutely paid and discharged, no suit having been brought within five years, next after the day on which such bill became due and payable ?

2° The Con. Stat., L. C., chap. 83, sec. 64, being clear and precise, could the Court below legally set aside the interrogatories *sur faits et articles*, which were served at the prothonotary's office ?

It may also be added that a question as to whether there is, in fact, legal evidence of interruption of the prescription of 5 years, is to be determined.

As to the first question, I am very much inclined to say that our statute is as stringent as the ordinance of 1510 relative to *rentes constituées* with reference to actions.

brought for five years' arrears. Actions were to be dismissed if brought. No oath was required ; it was an absolute bar, and so held.

With regard to the ordinance of 1629, for *loyers*, it was different, and correctly held to be so ; there was no such imperative enactment as in that of 1510. It was not a *fin de non recevoir*, the defendant pleading prescription had to swear.

The same view was taken of the articles 125, 126 and 127 of the *Coutume de Paris*. All these prescriptions were based upon the presumption of payment, and acted upon accordingly.

Our own statute of 1793, relative to promissory notes, was the only one which limited the obligation of the defendant to swear he had paid, in case of his being called upon to swear he had done so, and the heir that he *bond fide* believed the note had been paid.

I therefore would say that in the present case, the Con. Stat. L. C., c. 64, sec. 31, has, with respect to promissory notes, the same effect as the old ordinance of 1510, with respect to *rentes constituées*, and does not admit of a plea, nor of evidence of *interruption de prescription*. I would go further, and hold that, strictly speaking, this is not a question of prescription, nor of interruption of prescription, but merely one of a total extinction of an indebtedness. In the eye of the law the note is to be held to be absolutely paid and discharged.

8° I am of opinion that the Court below erred when it set aside the interrogatories *sur faits et articles*. The law may be inconvenient and hard in its execution ; but there it is, and the judge should have obeyed it. Sec. 64 of c. 86, is imperative.

I have great doubts as to whether, from the evidence, any Court would be justified in saying and deciding that the acknowledgments and promises to pay apply directly to the note, and whatever balance might, at the time, be due thereupon. The \$50 paid cover the \$40 for teeth sold to the defendant. Whether or not, matters little to me, considering the view taken of the law, as above explained.

I, therefore, come to the conclusion that the judgment appealed from should be reversed, and that the respondent should of course be condemned to costs in both Courts.

MEREDITH, Justice.—This case is one of great importance, for the question which it presents must be of frequent occurrence, and may affect interests of great magnitude; and I do not hesitate to say that, at first it presented considerable difficulty to my mind. That difficulty I am now inclined to attribute, not so much to the terms of the statute in question, as to the attempts which I (in common, I believe, with many others) have made to interpret its provisions, if not in accordance with the judgments under the english statute of limitations, at least by the light of those judgments. But, after giving the subject due consideration, I think that the decisions under the english statute tend rather to embarrass, than to aid us in determining the course to be pursued under our own law. In this however there is nothing surprising, because although the two laws are on the same subject, and, to some extent, have the same object in view, yet they are worded very differently.

We also know that the earlier decisions under the english statute are now generally disapproved of; and therefore cannot be considered as a safe guide to the meaning even of the english statute.

Lord Eldon, in *Baille vs. Sibbald*, declared that the statute of limitations had been construed with a view to

defeat, not to promote its object, and that the established construction was against its true principles. (1)

Chief-Justice Gibbs in *Hellings vs. Shaw*, said, that if the Courts could retrace their steps and see all the consequences that have resulted, they would have seen it better to adhere to the precise words of the statute than to attempt to relieve in particular cases. (2) And it is with reference to this statute that Sir William Evans, in his general view of the statutes of limitations, has said that the Courts of Justice have as much authority now (when he wrote) to restore the law as they had before to *subvert it*. (3)

If the provisions of our statute were similar to those of the english statute of limitations, which they are not, the foregoing authorities are sufficient to establish that even in that case we could not derive much advantage from a reference to the earlier english decisions on this subject; and, as to those of recent date, they are governed by the provisions of the 9th Geo. IV, ch. 14, which have not been embodied in our statute, chap. 64, Con. Stat. for L. C. pleaded in this cause.

Assuming then that we are to interpret our own statute, irrespective of the english decisions already referred to, and bearing in mind its terms—which are in effect—that any promissory note made after 1st August, 1849, “shall be held to be absolutely paid and discharged if no suit or action be brought thereon, within five years next after the day on which such note became due and payable,” it seems to me that under the provisions of this law, proof of the actual payment of part of the note sued on, within five years from the time the note became due, ought not to be considered as rebutting the presumption created

(1) 15 Vesey, p. 185, cited in Angell on Limitations, p. 223.

(2) 7 Taunton, p. 808, cited at same page of Angell.

(3) 3 Evans' Statutes, p. 236, note 1.

by the statute, or as militating, in any way, against the defendant. On the contrary, the effect of such evidence, as regards the part of the note paid, is to add positive proof to the statutory presumption, and, as regards the remainder of the note, the presumption appears to me to be exactly the same as if no proof had been made.

In like manner an acknowledgment of the debt, or a promise to pay it, within five years from the time the note became due, cannot, as to the question of prescription, have any greater effect than ought to be given to a payment on account; for, by a payment on account, is meant not the mere payment of a sum of money, but the payment of a *smaller sum* on account of a *greater sum*, due from the person making the payment to him, to whom it is made. (1) A payment on account therefore includes, in effect, an acknowledgment of a subsisting debt,—and if an acknowledgment of a debt, which accompanies a payment, is insufficient to prevent the operation of the statute; an acknowledgment of a debt unaccompanied by a payment, cannot have any greater effect. The same reasoning extends to promises to pay, made within the five years,—for where there is an unqualified admission of a subsisting liability, the law will infer a promise to pay. (2) In a word, a payment on account involves an acknowledgment of the debt; and from such an acknowledgment of the debt, the law implies a promise to pay,—and therefore, whatever is the rule with respect to payments on account, must also be the rule with respect to acknowledgments and promises made within the five years from the note becoming due.

1. As I have already observed, the fact of the maker of a note having paid a sum on account of it, say a year after it became due, does not, in any degree, tend to weaken the statutory presumption that the whole of the note was

(1) 2 Taylor on Evidence, p. 884, No. 992.

(2) Chitty on Bills, p. 614:—Angell on Limitations, p. 218.

paid within the five years; and, in like manner, if the maker of the note in the case supposed, when he made the payment on account expressly promised to pay the balance; the making of the promise would have no tendency to show that he did not pay the balance of the note, within the remainder of the five years.

The respondent wishes us to interpret the statute as if the words declaring that a promissory note "shall be held" "to be absolutely paid and discharged if no suit or action" "be brought thereon within five years, &c.," were followed by a proviso to the effect "that if it appears that any part" "of such note were paid within the said period of five" "years, then the said note shall *not* be held to be paid and" "discharged as to the remainder." But the law contains no such proviso; nor could such a proviso have been embodied in it without rendering it absurd.

It has also been contended, that it would be unreasonable to say that payment of any part of the principal or interest of a debt will suffice to prevent the prescription of six years established by our statute, chap. 67, Consolidated Statute, L. C., and yet to hold that a like payment will not interrupt the prescription of five years, established by chap. 64 of the same statutes. But, there is the same objection to our attempting to interpret the prescription established by chap. 64, of the Consolidated Statutes of L. C., by chapter 67, of the same statutes, that there is to any attempt to interpret the chap. 64, by the English statute of Limitations; that objection being simply, that the terms in which the two laws are framed are so essentially different, as to make it impossible to interpret the one by the other. In addition to the difference between the enacting clauses of the two colonial statutes, the Legislature has subjected the six years prescription established by our chap. 67, to a proviso respecting payments on account, to

which they have not thought fit to subject the prescription of five years established by the chap. 64.

I am quite aware that a strict interpretation of the terms of our statute, may, in certain cases, bear hard upon individuals; but the remedy is with the Legislature, and the result of the attempt, made by the English Courts, to exclude certain cases from the operation of their statute of Limitations affords additional proof, if any were wanting, of the danger of attempting to modify a statute by Judicial interpretation.

For these reasons, I am of opinion that under the terms of our statute, we cannot avoid holding the note in question to be paid and discharged, as no suit or action was brought thereon within five years next after the day on which it became due and payable.

But, Judgment should be in favour of the respondent for the open account.

I think it proper to observe that the law on this subject has been materially changed by the Code; and therefore the judgment now rendered cannot serve as a guide in solving questions of prescription that may arise respecting promissory notes to be made after our code shall have come into force.

Judgment in appeal.—“Considering that in the judgment complained of, in so far as it condemns the appellant to pay to the respondent the sum of forty dollars, for goods sold and delivered by the said respondent to the said appellant, and for money paid, laid out and expended by the said respondent, for the said appellant, there is no error; The Court doth confirm the said judgment, to wit: the judgment rendered by the Superior Court, at Montreal, in this cause, on the 31st day of December, 1863, in so far

as it condemns the appellant to pay to the respondent the sum of forty dollars, with interest, &c."

"And as regards the remainder of the said judgment, seeing that the promissory note therein mentioned was made on the 15th day of September, 1856, payable one day from date, and that no suit or action was brought on the said note, within five years next after the day on which such note became due and payable; and considering, that, in consequence thereof, and in virtue of the statute in such case made and provided, the said note must be held to be absolutely paid and discharged, and therefore that in the said judgment, in so far as it condemns the appellant to pay to the respondent, the amount of the said promissory note with certain interest and costs, there is error, doth in consequence reverse the said judgment in so far as it condemns the appellant to pay to the respondent the amount of the said promissory note, and certain interest due thereon, to wit: the sum of \$348.16, amount of the said promissory note, and \$43.50, being the balance of interest due upon the said promissory note, and doth also reverse the said judgment in so far as it condemns the appellant to pay to the respondent his costs in the Court below; and proceeding to render the judgment which the Court below ought to have rendered in the premises, doth dismiss the action and demand of the respondent for the amount of the said promissory note and interest; and as regards the costs in the Court below, the court condemns the appellant to pay to the respondent his costs as in an action of the Circuit Court, for forty dollars, and as regards the costs of this Court, it is ordered and adjudged that the respondent do pay to the appellant his costs in this Court. The Honorable Mr. Justice Aylwin dissenting."

ROBERTSON, for appellant.

SNOWDON & GAIRDNER, for respondent.

SUPERIOR COURT.—MONTREAL.

Before:—MONK, Justice.

No. 723. { THE ATTY. GENL. *pro* REGINA..... *Petitioner.*
 vs.
 THE GRAND TRUNK RAILWAY COMPANY
 OF CANADA..... *Defendants.*

In the proceedings for an injunction against the Grand Trunk Railway Company of Canada, under the provisions of the Consolidated Statute for Lower Canada, chap. 88, sec. 9, sub-sec. 1, it was alleged that the company had illegally carried on the business of carters, within the City of Montreal, and conveyed freight to and from the City to their depots, and had charged tolls and freight for such conveyance without the authority of any by-law approved by the Governor in Council, injuriously to the carters and citizens of Montreal, and a judgment was prayed for declaring that in so doing the Company had exercised franchises not conferred by law, and exceeded their legal powers, and praying also that the Company be enjoined to abstain from using the occupation of carters within the City, and be restrained from carrying freight between the Railway depots and stores and residences in the City.

Held:—1st. That the allegations of the petition as presented were sufficient and would not be rejected on a motion to quash, or on special demurrer.

2nd. That it resulted from the evidence adduced, that the collecting and delivery of freight by carters exclusively employed for that purpose by the Company, was not injurious, but on the contrary advantageous to the public.

3rd. That the Company had a right to employ particular carters exclusively for so collecting and delivering freight; and that this was not in violation of their charter, but was essential, or at least incidental to their business as common carriers, and fell within the meaning of "The Act respecting Railways;" (Consolidated Statute of Canada, chapter 86, sec. 8,) which enacts that the Company "shall be invested with all the powers, privileges and immunities necessary to carry into effect the intention and object of this act and of the special act therefor, and which are incident to such corporation, &c."

Dans des procédures pour une injonction contre la compagnie du grand Tronc de chemin de fer du Canada, en vertu des dispositions du Statut Refondu du Bas-Canada, chap. 88 sec 9, sous-sec. 1, il était allégué que la compagnie avait illégalement exercé le métier de charretiers, dans la cité de Montréal, et transporté du fret de la cité à leur dépôt, et du dit dépôt à la cité et avait pour cela prélevé certains taux sans l'autorité d'aucun règlement approuvé par le gouverneur en conseil, au détriment des charretiers et citoyens de Montréal, et l'on concluait à ce qu'il fut déclaré qu'en ce faisant la compagnie avait exercé des privilèges qui ne lui étaient pas accordés par la loi, et avait excédé ses pouvoirs légaux, et concluait aussi à ce qu'il fut enjoint à la compagnie de s'abstenir de charroyage dans la cité, et restreinte du transport de fret entre le dépôt du chemin de fer et les magasins et résidences dans la cité.

Jugé:—1o. Que les allégations de la requête, telle que présentée, étaient suffisantes et qu'elle ne serait pas rejetée sur motion pour la faire mettre de côté, ou sur défense au fonds en droit.

2o. Qu'il résultait des témoignages produits, que la collection et la livraison de fret par des charretiers exclusivement employés pour cet objet par la compagnie ne faisaient aucun tort au public, mais au contraire lui étaient un avantage.

3o. Que la compagnie avait droit d'employer exclusivement certains charretiers pour la collection et livraison de fret; et que ceci n'était aucune violation de leur charte, mais était essentielle, ou du moins un incident de leur négoce comme voituriers, (common carriers) et tombait sous les dispositions de "L'acte concernant les chemins de fer;" (Statut Refondu du Canada, chap. 86, sec. 8,) lequel pourvoit que la compagnie "sera investie de tous les pouvoirs, droits et privilèges qui sont ou pourront être nécessaires pour effectuer les intentions et les objets du présent acte et de l'acte spécial passé à cet effet, et qui seront propres à cette corporation, &c."

4th. That the complainants (carters of the City of Montreal,) had not shewn they had suffered to such extent as would justify the issuing of the injunction prayed for.

5th. That no injunction will be issued to restrain the defendants from illegal acts which are not shewn to have been directly injurious to the petitioners, and at the same time injurious to the public.

Seemle.—That where the petition alleged that there was no by-law of the Company, approved by the Governor in Council, to regulate and establish the rate of tolls on their road, and the Company alleged that a by-law had been sanctioned by the Governor General according to law, and no proof was adduced by either party in respect of such allegations: The Court will hold the burden of proof to be on the Company, and that no such by-law existed.

4e. Que les plaignants, charretiers de la cité de Montréal, n'avaient pas constaté qu'ils avaient souffert de manière à ce que la Cour fut justifiable à émaner l'injonction que l'on demandait.

5e. Qu'il ne sera émané aucune injonction pour empêcher les défendeurs de commettre des actes illégaux qui ne sont pas constatés avoir été directement injurieux aux requérants, et en même temps injurieux au public.

Il semble.—Que dans le cas où la requête alléguait qu'il n'y avait aucun règlement de la compagnie approuvé par le gouverneur en conseil, pour régler et établir les taux sur leur chemin, et la compagnie alléguait que tel règlement avait été sanctionné par le Gouverneur Général, et qu'aucune preuve ne fut faite par l'une ou l'autre des parties touchant telles allégations: La Cour maintiendra que *l'onus probandi* incombait sur la compagnie, et que nul tel règlement existait.

Judgment rendered the 9th December, 1865.

The pleadings and proof in the cause will be understood from the remarks of the Court in rendering judgment:

MONK, Justice:—This is an application made to me at the instance of the Attorney-General against the Grand Trunk Railway Company of Canada for an injunction to restrain that Company from the exercise of the business of common carters within the limits of the city of Montreal. It would appear from the evidence adduced, that the Grand Trunk Railway Company employ exclusively a Mr. Shedden to collect and deliver freight within and near the city of Montreal. That the master carters of this city are excluded from all participation in the business of collecting and delivering for the Grand Trunk; and consequently it is sought, upon the grounds to be hereafter fully stated, to restrain the company from the exercise of this privilege or monopoly, carried on in this way through the instrumentality of Mr. Shedden.

Before proceeding to develop the particular facts of this case (which is one of considerable importance to the parties in the cause, and also to the public,) and to adjudicate upon

the points submitted, it may be proper to remark that in England this proceeding is by rule, and the cases are tried upon affidavits. In this country we have special legislation on the subject. These provisions of law are found in the 88th chapter of the Consolidated Statutes of Lower Canada, and are to the following effect :

“ Whenever any association or number of persons act within Lower Canada as a Corporation, without having been legally incorporated, or without being recognised as such Corporation by the Common Law of Lower Canada,—and whenever any Corporation, Public Body or Board offends against any of the provisions of the act or acts, creating, altering, renewing, or reorganizing it, or violates the provisions of any law in such manner as to forfeit its charter by misuser, and whenever any such Corporation, Public Body or Board has done or omitted any act or acts, the doing or omitting of which amounts to a surrender of its corporate rights, privileges and franchises, and whenever any such Corporation, Public Body or Board *exercises any franchise or privilege not conferred on it by law*,—it shall be the duty of Her Majesty’s Attorney-General for Lower Canada, whenever he has good reason to believe that the same can be established by proof, *in every case of public interest*, and also in every such case in which satisfactory security is given to indemnify the government against all costs and expenses to be incurred by such proceeding,—to apply for and on behalf of Her Majesty to the Superior Court sitting in the district in which the principal office or place of business of such persons so unlawfully associated together, or of such Corporation, Public Body or Board is situate, or to any judge of such court in vacation, by an information, declaration or petition, *requête libellée*, supported by affidavit to the satisfaction of such court or judge, complaining of such contravention of the law, and praying for such order or judgment thereon as may be authorised by law.” Thereupon a writ issues, and the defendants are called upon, as in all other cases, to

answer the declaration or petition, and the subsequent proceedings are similar to those in ordinary suits at law.

The Grand Trunk Railway Company of Canada was incorporated, and its charter altered and amended under a variety of statutes to which it is not necessary to refer at the present moment; and to this Corporation the clauses of the Railway Consolidation Act, 14 and 15 Vic. cap. 51, are applicable, and some of which will have to be considered hereafter.

After these preliminary observations (rendered in some degree necessary to test and fully comprehend the decisions and the authorities to be referred to in the sequel), we come to the consideration of the important case before us. And here I may remark, that I consider it proper to review the pleadings and evidence at greater length than in ordinary cases, because the question is new here, and of public importance; and moreover it is desirable if new in fact, that the parties whose rights and interests are to be affected by my judgment, should rest satisfied that no essential point has escaped the attention of the Court.

The petition sets forth several distinct charges against the Grand Trunk Railway Company. Some of these charges are general—some specific; and they may be succinctly stated to be as follows, viz. :

1st. That the Grand Trunk Railway Company of Canada exercise the occupation of carters in and within the limits of the city of Montreal, and carry and transport for hire, goods and merchandize from their depots to and from the stores and residences of the citizens of Montreal.

2nd That the company charge tolls for the transport of goods and merchandize from Montreal to places on their line of Railway, and that such tolls are uniform, and the same, whether the goods and merchandize are carted at the expense of the sender and receiver of the same, by his

own carter, or at the expense of the defendants by persons employed by them from and out of the tolls so charged.

3rd. That the defendants openly, publicly and in violation of law, have used for a year and upwards, and do now use carts and sleighs, with horses attached, for the transport of goods and merchandize to and from their depots with the letters G. T. R. printed thereon, to wit: Grand Trunk Railway, in and within the limits of the city of Montreal, and do exercise the occupation of carters in and within the city.

4th. That the defendants demand and obtain payment of tolls, which are not payable at the same time and under the same circumstances upon all goods; but that, on the contrary, they exercise an undue advantage, privilege and monopoly, injurious to the carters of Montreal and the citizens, and which could not by law be authorised by any by-law, legally enacted or approved by competent authority.

5th. That the tolls exacted by the defendants for the transport of goods and merchandize on their Railway include cartage rates, and are levied without the authority of any by-law to that effect, approved of by the Governor in Council, and that the same has not been published in the *Canada Gazette*.

6th. That the defendants have not printed and stuck up in the office or place where the tolls are to be collected, or in every or any passenger car, a printed board or placard exhibiting all the tolls payable, and particularizing the price or sum to be charged, for the carriage of any matter or thing.

And the conclusions of the petition ask for seven different orders or judgments, viz.: that it should be adjudged and declared:

1st. That the company have exercised a franchise and a privilege not conferred by law.

2nd. That the company have offended against the provisions of the Act or Acts creating, altering, renewing or re-organizing the said Corporation.

3rd. That the defendants have exceeded the powers, capacities, franchises and jurisdictions conferred upon them.

4th. That the imposition of tolls, including the cartage of the goods and merchandize, in and within the limits of the city of Montreal, may be declared illegal, and in contravention of the law.

5th. That the imposition of tolls without the authority of a by-law, approved of by the Governor in Council, &c., be declared illegal.

6th. That it be declared that the defendants carry on the business and occupation of common carters within the limits of the city of Montreal, and that their doing so is illegal.

7th. That the company be enjoined to abstain from using the occupation of carters within the city of Montreal, and be restrained from carrying goods and merchandize from and to their depots to and from the residences and stores of the citizens of Montreal.

The defendants met the action by a motion to quash the writ and petition, by a special demurrer, and by three other pleas amounting to the general issue. It is necessary to advert to this preliminary plea. The reasons assigned in the demurrer (omitting the first reason) are:—

2nd. Because the said allegations of the said petition are wholly vague, uncertain and indeterminate, and the pretended offences or contraventions of law therein alluded to are not particularized or specified as to time, place, or

circumstance, and no specification of the alleged acts or omissions, intended to be proved or relied on, is contained in the petition.

3rd. Because it is not alleged in the petition that any person or persons was or were injured or defrauded, or, if so, in what manner any such person or persons was or were injured or defrauded, by any of the alleged acts or omissions of the defendants.

4th. Because the petition illegally combines and includes several pretended illegal acts and omissions of defendants; some of which are properly the subject of a writ of *Mandamus*, and others of a process or proceeding in the nature of a writ of prohibition, and which require separate pleas and issues, and call for separate and distinct orders and judgments, and cannot by law be contained in one complaint or petition.

5th. Because no interest whatever is disclosed by the petition, on the part of the private persons named therein, in the pretended illegal acts or omissions of the defendants, nor in the maintenance of the conclusions of the petition.

6th. Because the conclusions of the petition are wholly vague and insufficient, and judgments and orders are thereby illegally demanded, not upon alleged distinct and defined acts, defaults or omissions of the defendants, but upon general abstract questions of law, in the decision and determination of which no interest is alleged by the petition on the part of any person or persons, and a judgment upon which questions would be of no practical force or effect.

7th. Because the defendants were and are, by law, common carriers for hire of goods and passengers, and, as such, had and have the right for the convenience of the persons employing them, as well as for their own convenience, in the ordinary course of their business of common carriers,

and as incidental thereto, at any place in Montreal, to receive goods for carriage, or deliver goods which have been carried on the Railway.

8th. Because in and by the petition, no infraction is shown on the part of the defendants, of any of the rights conferred, or obligations imposed upon them by the acts incorporating or referring to them, such as to justify the conclusions of the petition.

After hearing upon the motion as well as upon the demurrer, I gave the following judgment on the 26th of April last :

“ Having duly considered the motion of the 12th day of April instant, made on behalf of the said defendants, that the writ of summons issued, and the petition filed in this matter, and each of them, be quashed and set aside. Having examined and considered the reasons urged in support of the said motion and heard the parties by their respective Counsel upon the said motion, I do dismiss the said motion, with costs; and, having considered the special demurrer or *défense au fonds en droit* pleaded by the defendants, to the petition and demand of the said petitioner, and heard the parties, I do order, *avant faire droit* upon the said demurrer, that evidence be adduced.”

I was then, and I am still of opinion, that the motion to quash should be rejected, and I have no hesitation in saying that the special demurrer is likewise unfounded. So far as this complaint goes, I think the petition is prepared with great skill and with marked ability. The allegations set forth the whole case with force, clearness and precision. It may be that here and there, in the statement of the facts, and the matter of complaint some vagueness and want of detail may be apparent, and a slight redundancy of averment occasionally may be found. But this superabundance of allegation—the accumulation observable in the conclusions of the petition, do not, in my judgment, impair or weaken

the point and effect of the whole. The case is fairly and fully stated, and in such a way as legally to force the company upon their defence, and to bring the cause up for adjudication upon its merits, more particularly as all the points of law urged in this preliminary plea come up under the general issue.

The special demurrer is therefore dismissed with costs. There remain the three pleas above referred to, and the answers to them, which are general.

Upon this issue the parties have proceeded to *enquête*. It may be succinctly stated that on behalf of the petitioners, the evidence went to prove that the cartage to and from the company's depot for about eighteen months past had been exclusively done by one Shedden, a person who took out licenses as a carter; that previously another system prescribed the cartage being done by carters employed by the parties sending or receiving goods,—that the new system was inconvenient, and the old one much preferred.

On behalf of the company a number of witnesses were examined, and they are, I may say, unanimously of opinion that the system complained of by the petitioners has proved and still proves a great benefit and convenience to the public. After considering this conflicting testimony with great care, I have no hesitation in expressing the opinion that it is proved that the collecting and delivering freight, merchandize, packages, &c., by the company's carters, is a convenience and beneficial to the public. It must, I think, be obvious to every dispassionate and unbiassed mind, that, if not absolutely necessary to carry on the business of the company, yet that their system in this particular, and wholly irrespective of some very objectionable features to be adverted to hereafter, must be highly useful to their customers; and it appears to me, moreover, that this opinion is fully corroborated by the evidence adduced by the defendants. But the complainants contend that public conve-

nience alone is not the question here. Assuming that the public at large are benefitted by this arrangement, there still remains the complaint by the petitioners. That the Grand Trunk, particularly by the occupation of common carters in and within the limits of the city of Montreal, and by the charging of tolls including cartage rates, and by the absence of any by-law authorizing any tolls to be collected, approved of by competent authority, have offended against the provisions of the act and acts creating, altering, renewing, or re-organizing them as a corporation, and have exercised and assumed to exercise franchises and privileges not conferred upon the corporation by the act or acts—or by any law, and have exceeded the capacity and jurisdiction conferred by law on the corporation, and illegally assumed powers and privileges beyond, and in addition, and contrary to those which by virtue of the act or acts, creating, altering and renewing or re-organizing said corporation, were conferred on the corporation, thereby affecting the public interest to an extent sufficient for all the purposes of this petition.

Before proceeding to consider at length the arguments and the authorities offered by the respective counsel of the parties, it may be proper to dispose at once of one point in this case. It was formally alleged by the complainants that the company have no by-law regulating and establishing the tolls upon their line of road, and that if such by-laws have ever been passed they have never been submitted to, or been approved of by the Governor in Council. To this the company replied that such by-law had been passed and sanctioned by the Governor according to law. • Now the defendants have wholly failed to sustain this averment by proof, and, in the absence of such proof, I must assume as true, that there has been a great and serious omission here.

This no doubt is a very grave irregularity, amounting to a violation of law, and the sooner it is remedied, and the

express requirements of the statute are complied with, the better.

It has been urged, however, by the defendant's counsel that I have nothing to do with this alleged infraction of the law on the present occasion.

But without anticipating opinions which will receive a more suitable expression as the authorities and decisions applicable to the case are more fully developed and examined, I come now to the consideration of the law as presented at the argument by the respective counsel who have submitted the case with so much ability and learning.

Mr. Stuart's propositions upon the facts, as proved on the behalf of the petitioners, may be stated as follows, viz :

1st. It is clearly proved that the company, through Mr. Shedden, their subordinate agent, or *employé*, exercise and use the occupation of carting for hire to and from their depots within the limits of the city of Montreal.

2nd. That in doing so, it is established as a matter of fact, that the company is guilty of an infraction, a violation of law, because their charter does not confer on them any such right, privilege or franchise, but on the contrary limits their operations to their line of railroad.

3rd. That in addition to this violation of law, it will be seen that they in this way exercise a monopoly which is directly detrimental to the master carters of Montreal; and both for that reason, and because such an occupation is a violation of law, the case is one of public interest, and concerns the master carters and the public at large.

4th. That the carrying on the business of carters by the company under the system pursued by them, and as proved, necessarily involves a variety of distinct violations of the law, such as are fully enumerated in the conclusions of the petition, and each and all of which, whether consi-

dered separately or combined, in one continuous, open and public transgression of their charter, brings the acts of the company under the provisions of the statute, and imposes upon me the duty to restrain them from a course of proceeding at once illegal and of the highest interest to the public generally, and to the master carters of this city in particular.

5th. That whether these open and public violations of the law conduce to the advantage of the public, or be or be not, in the opinion of a majority of the citizens, a convenience to the community, the infraction of the law alone justifies the application of the restraining power of the Court.

Upon the first point, it is unnecessary to say more than that the fact asserted by the petitioners is clearly and conclusively established. Mr. Shedden is the agent or *employé* of the Grand Trunk, and is employed in the manner and for the purpose set forth in the petition. It is quite true the company derive no pecuniary advantage from this arrangement, but it is equally certain that the company have granted to Shedden an exclusive preference, and that he is exclusively employed by them. Whether this proceeding on the part of the company be in itself illegal or not, and if it be so, whether it is an infraction of the law which the present petitioners can have stopped by an injunction, will come up for consideration in the sequel of these remarks. I may also state that the company's system of charging, generally, cartage in the regular tolls, on their road, without distinguishing between these charges, is proved as alleged by the petitioners, but no instance is given, or brought under my notice. It is, moreover, established as a matter of fact that the company are in the habit of charging cartage for collection and delivery, whether the work be done by their own carters, or by those of the consignor or consignee. But here again the petitioners have failed to allege or prove a single instance

in which this has been done. It is likewise clear, in my opinion, from the evidence adduced, that in the charge for cartage of freight, to and from their depots, the company exact the same amount for carting one or two miles that they do for the shortest distance; that in other words the tariff for carting is uniform, irrespective of distance. But again no cases are shown where this has occurred. From this peculiar mode of doing business and dealing with their customers, I think it cannot be denied that, as a matter of fact sufficiently proved, there must inevitably result something very anomalous; that is inequalities, perhaps unreasonable preferences in the tolls and rates which the company charge the public. Finally, it is proved that a highly respectable body of men are almost entirely, if not entirely, excluded from all participation in a branch of business very extensive and important, and which they contend should be free to them and open to competition. Upon the law of this case a great number of decisions and authorities from England, France and America, in support of the claimants' pretensions, have been cited.

Most of the cases cited by Mr. Stuart go to establish the nature and effect of the writ of injunction and point out the cases in which such a remedy will apply, he has also cited authorities to show the limited power of corporations.

"A corporation being the mere creature of law possessing only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence." (1) "That a corporation is strictly limited to the exercise of the powers which are specifically conferred on it will not be denied. The exercise of the corporate franchise being restrictive of individual rights, cannot be extended beyond the letter and spirit of the act of incorporation." (2)

(1) *Trustees of Dartmouth College vs. Woodward*, 4 Wheaton, 518:—4 Cond. Rep. 526,—see page 443.

(2) *Beatty vs. Knowler*, 4 Peters, 152, see page 444.

The first case cited was that of the company of proprietors of the Navigation of the River Dun, against the North Midland Railway Company. There it was held by the Lord Chancellor "that when it is clearly shown that a public company is exceeding its powers the Court cannot refuse to interfere by injunction." The special circumstances of that case were very different from the present. But what was there held is, no doubt, good law.

The next citation is from Shelford on the law of Railways, vol. 1, p. 100. He says: "If a railway or other companies go beyond the powers which the legislature has given them, and in a mistaken exercise of those powers interfere with the property of individuals, the Court of Chancery is bound to interfere for the purpose of keeping such companies within those powers," (1) "of course it must be a case in which the Court is very clearly of opinion that the company are exceeding the powers which the act has given them." (2) "This is a most wholesome exercise of the jurisdiction of the Court, because great as the powers necessarily are to enable the companies to carry into effect works of magnitude it would be most prejudicial to the interests of all persons with whose property they interfere, if there were not a jurisdiction continually open and ready to exercise its power for the purpose of keeping them within that limit which the legislature has thought proper to prescribe for the exercise of their powers whenever a proper case for it is brought before the Court," otherwise the result may be that after property has been taken and destroyed, after a house has been pulled down and a railway substituted in its place, the owner may have the satisfaction at a future period of discovering that the Railway Company were wrong." (3) "Where a railway company had by its charter the exclusive right to transport and carry persons, produce, merchandize and all other things."

(1) *Agar vs. Regent's Canal Co.*, Coop. 77.

(2) *River-Dun Navigation Co. vs. North Midland Rail. Co.*, 1 Eng. Rail. Cases, 154.

(3) *River Dun Navigation Co. vs. North Midland Rail. Co.*, 1 Eng. Rail. Cases, 163. 154:—*Kemp vs. London and Brighton Railway Co.*, 1 Eng. Railway Cases, 365.

"That injunctions in substance mandating though in form merely prohibitory, have been and may be granted by the Court is clear. This branch of its jurisdiction may be one not fit to be exercised without particular caution, but certainly it is one fit and necessary under some circumstances to be exercised, under what circumstances it should be exercised must be matter for judicial discretion in each several case." (1) In that case a mandatory injunction was granted, which in effect compelled a railway company to pull down walls which they had built, in order to prevent another railway company from crossing their line.

The next case is taken from the Georgia Reports, p. 221, and would seem to bear directly upon the question under consideration, in the case by the Mayor of Macon against Macon and the Western Railroad Company, in which it was held: "That where a railroad company had by its charter the exclusive right to transport and carry persons, merchandise and all other things over their road from Atlanta to Macon, yet the charter conferred no power upon the company to engage in the business of transporting produce through the city of Macon, across OcMulgee Bridge," of their customers. (2) I shall have occasion to consider this case hereafter. I come now to the consideration of the case of Baxendale against the Great Western Railway Company. Much reliance was placed upon the case at the argument of the petitioners' counsel. I find the Report to be as follows:—

The Railway Company make one general charge for the conveyance of goods, whether they are delivered at their station at Paddington, whether they are delivered at their receiving-houses in different parts of London, or whether they collect them from house to house in their own waggons. The plaintiffs are the great carriers, Pickford

(1) Per Bruce, V. C., *Great North of England, &c., Juno. Railway Co. vs. Clearence Railway Co.*, 1 Coll E. C., 521.

(2) *Mayor of Macon vs. Macon and Western Railroad Company*, Georgia Reps., 221.

& Co., and they brought this action to recover back sums of money which they had paid for tolls and for carrying their goods on the railway, but which they contended included, in fact, charges for the collection and conveyances of goods to or from the different receiving-houses of the Company, but which they as carriers collected, to the Paddington station. When the case was argued in the Court of Common Pleas, Lord Chief-Justice Erle delivered a judgment in favour of the defendants, but the rest of the Court differed from him, and the decision was, therefore, in favour of the plaintiffs. To this was a writ of error. The Court of appeal, which assembled in the Exchequer Chamber, consisted of Lord Chief-Justice Cockburn, Justices Crompton, Blackburn and Mellor, and Barons Martin, Channel and Pigot. At the close, the Chief-Justice said that they were all agreed that the judgment of the Court below must be affirmed. The matter appeared to turn, not on the Traffic act, but upon the Company's own act, which contained a clause for equality of charges which were afterwards renewed. It is said that the charges should be made equally, and the construction had been put upon it in a case in the Court of Common Pleas, which applied to a case like the present, and it will not be competent for a railway company to superadd by the tolls they were entitled to charge another charge for collection of conveyance to or from the railway, inasmuch as in doing that they were imposing upon those who did not require their service for such collection or conveyance, and a charge which might be a reasonable charge, as regarded those who require the service, but unreasonable as regarded those who did not, therefore it was an equal charge. That construction having been put upon the act by the Court of Common Pleas, this Court were all of opinion that that was the right view, and that the judgment was correct, and they hoped that in future a charge for those services might not be under the guise or disguise of tolls on a railway—Judgment affirmed.

It is worthy of remark, indeed it is essential, that the fact

should be borne in mind, that this was an action at law brought by the party aggrieved to recover back from the company sums of money paid them for services they had never performed. It may perhaps be considered astonishing that the case should have ever admitted of a doubt.

In the present case this application is for a writ of injunction against the Grand Trunk Company and complaint is not made by parties who use the road—at least that does not appear from the evidence—or by persons who have employed the company and suffered by irregularity and inequality in the rates and tolls—this case, therefore, cannot be held to have any direct application to the one under consideration.

A number of *arrêts* rendered in France on railway cases during the past fifteen years were cited by Mr. Dorion—after a careful examination of these decisions I do not see that they throw much light upon the questions raised in the present proceedings. The first case cited was that of *La Compagnie du chemin de fer de Strasburg à Bale vs. Pflug & Cie.* (1) Pflug & Co. had obtained an *arrêt* prohibiting the Railway Company from carrying beyond their line, but this decision was reversed by the *Cour de Cassation* as a violation of art. 5 of the Code Napoleon. If this authority have any bearing, it seems to be somewhat against the pretensions of the petitioners. Three other cases were cited by the first of which (2) it was held that a consignee has a right to receive his goods at the station and to do the cartage at his own expense, the *cahier de charges* of the railway expressly reserving to him the right; and by two other cases (3) the same right in the consignee was recognized, notwithstanding the agreement between the company and the consignor, as shown by the *lettre de voiture*, was that the goods should be conveyed to the consignee's domicile.

(1) Dalloz, Rec. Per., 1852, part 1, p. 204.

(2) Dalloz, Rec. Per., 1852, part 1, p. 226.

(3) Dalloz, Rec. Per., 1860, part 2, p. 175, and 1861, part 1, p. 317.

The reasons given for these judgments were that the consignee is not the agent of the consignee, and that the *cahier de charges* reserved to the latter the right to receive his goods at the station.

The *arrêt* cited from Dalloz, Rec. Per., 1854, 110, part 4, seems to have held that the Railway Company had violated a provision expressly prohibiting them from giving special advantages to one company over another. The facts do not appear to correspond with those in the present case, and the question was, in a great measure, one of interpretation of the company's charter.

The only other French *arrêt* cited which remains to be noticed is found in Dalloz, Rec. Per., 1850, part 1, p. 197. In that case damages were recovered by a rival carrier from a railway company for having lowered their tariff without giving the notice and observing the formalities required by law.

Many of the principles laid down in these *arrêts* it would be impossible successfully to combat, but it is to be observed that they are all applied in cases of a private nature, and where the ordinary legal remedies were sought, by parties bringing actions against railway companies for specific acts. The only decision granting a general prohibition (that first cited above) was reversed by the *Cour de Cassation*.

The value of these modern French authorities will however depend much upon the terms of the particular laws establishing the Railway Companies which were parties to the cases—none of which enactments have been laid before me.

I may remark that in referring to the foregoing *arrêts* my attention was arrested by a case reported in Dalloz, Rec. Per., 1854, part 1, p. 221, and which was not cited on behalf of the defendants. It was there held that Railway Companies, in establishing offices in cities for the forwarding of

merchandise, only exercise a right conferred on them by the *droit commun*, and that their doing so gives rise to no claim for damages on the part of *commissionnaires de transport* existing in the same cities, based upon the injury done by the Railway Company to the business of such *commissionnaires*.

Upon a careful review and examination of the decisions and authorities above cited by the learned counsel for the complainants, it will, I believe, be found that none of these cases involved or turned upon the question raised here, unless it be that the one in Georgia may be considered as bearing directly upon the point. But the circumstances upon which that decision rests are not given, nor has the charter of that company been laid before me. It may be that in it were some provisions which restricted the operations of the company, or impliedly prohibited the extension of their business beyond their line of road. I would not, moreover, feel justified in following this precedent, if found to conflict with the decisions in the english or other american courts. With insufficient knowledge of the facts, and amidst a various and fluctuating jurisprudence, such a ruling would scarcely be an authority which I could safely adopt.

The petitioners' counsel contends that the imposition of tolls, including the cartage of goods not allowed by law, is a matter of public interest, requiring the interposition of the public authority. Besides, that the carriage of goods by the carters of the company, is a necessary consequence of this imposition of tolls for such service, and the judgment declaring such tolls illegal, must be followed by an interdict preventing them from carting as a clear contravention of the law. This, no doubt, is complained of in the petition; and I am asked to declare that these acts of the company are illegal; but I am not required to restrain them from the perpetration of these acts. The question as to the legality of these tolls and the mode of imposing

them, incidentally arise ; and I have no hesitation in saying that no railway company have the right to impose a charge for the conveyance of goods and merchandise to and from their stations when their customers do not require such service to be performed ; and more especially is this true, when, as a matter of fact, the cartage is not done : and an action at law would lie at the instance of parties aggrieved, to recover back such an illegal charge. It was so held in the case of Baxendale against the Great Western Railway ; and in Garton against the same company ; also in a more recent case of Garton against the Bristol and Exeter Railway Company. This is a plain infraction of law ; but to what extent it has occurred in this branch of the Grand Trunk Company's business, if it exist at all, the evidence does not disclose. Adopting the views of the petitioners' counsel with certain limitations and reserve, I would go further, and declare it to be my opinion, that the system adopted by the Grand Trunk Company of including the charge of cartage in their regular railway tolls, and as they do in most cases,—omitting to distinguish the charge for cartage from the toll on the road,—in fact including both charges in one block sum, is a mode of doing business which the law can hardly sanction. It is, in fact, as contended by the petitioners' counsel, or it might become a means of systematic coercion ; and is obviously calculated, in a manner more or less direct, to cause unjust and perhaps unreasonable preferences, and likewise to destroy that perfect equality in the business transactions of the company, which, as a corporation, they are bound to exercise, and strictly to observe towards the public. I will go further, and add that, had I been required, at the instance of persons who had suffered wrong, to issue an injunction to restrain the company in the two particulars last mentioned, I should have probably done so, assuming always that, in addition to individual cases of injustice and hardship distinctly alleged, and as clearly proved,, this course was demonstrated to be injurious to the public. The same

remark would apply to an application to restrain the company from levying tolls not sanctioned by the Governor, as directed in the statute. But if there be any parties who have suffered from these objectionable modes of working the road, they do not complain to the courts. They seem, from apathy or indifference, or perhaps because the public do not in reality suffer, willing to allow the company to follow its own course. As to the present complainants, they show no direct personal interests in restraining the company from the commission of these illegal acts. I cannot concur in opinion with their counsel that these infractions of law are the necessary consequences of their doing, through Mr. Shedden, their own cartage. Each violation of the law stands alone, and must be viewed separately; and the complainants should have shown that they are directly interested, and also that the public are injured. This they have not done. And as regards these special grounds of complaint, I would also remark here that they do not set forth or prove a single instance in which the law has been violated in these respects; nor in regard to any of these illegal acts and omissions of the Company, is there any specification of time, place, or circumstance. In order to enable me to issue an injunction ordering the company to desist from these illegal acts, all this was absolutely necessary. Without such allegation, and without such proof, even supposing all the other conditions of individual wrong and public injury to have existed, I could not have interfered. This pretension, therefore, of the petitioners is in my judgment unfounded.

But it is contended that the company usurp a franchise and privilege not conferred by their Charter, in exercising the business of carters within the limits of the city of Montreal. Now I feel satisfied, whether this right be or be not essentially necessary to their business of common carrier or not, that this is not a franchise or a privilege in

contemplation of the statute, and that upon that ground alone I cannot issue the injunction prayed for.

The case, then, in my opinion, is narrowed down and limited to this: The company, by their own carters exclusively, or through Shedden, carry goods and merchandize for their customers to and from their depots, and to and from the stores and residences of the city of Montreal. And I have to determine whether this course of proceeding be legal or illegal; and if illegal, can I restrain them from doing so. And this brings me to the chief grounds of defence taken up by the defendants.

The objections urged by the defendants may be considered under the following heads:—

1. The complainants, by their petition and the proof adduced, do not disclose a case of public interest, nor any right or interest, on the part of the private persons referred to in the petition to initiate or carry on the present proceedings.

2. The company have, as common carriers, a right which is incidental to their principal business, to take delivery of, or to deliver outside of the limits of their road, goods which are intended to be, or which have been, carried upon the railway, and, consequently, that their employment of Mr. Shedden is no violation of law.

In support of the first proposition, it was urged that the statute under which the writ in this matter was issued, provides an extraordinary remedy in cases of public interest, in which Corporations are guilty of certain acts or omissions. It will not be denied that complaints of a private nature against corporate bodies, or those arising from illegal acts or omissions affecting individual interest only, cannot properly be brought under the act. It was argued by Mr. Ritchie that a very grave ground of objection against the petition in this cause is, that it contains no alle-

gations disclosing illegal acts or omissions on the part of the defendants in any way prejudicial to the public interests, nor in what way the rights or interests of the public are affected. Also, that the petition is equally defective in not showing any legal interest on the part of the carters named in it, whether considered as acting for themselves or as also representing others following the same occupation. These persons, it is contended, do not show in what way they have been injured by the alleged course of the defendants. The tolls said to have been illegally exacted by the company have not been paid by them; and even if excessive, which they are no where stated to be, the carters are not prejudiced. That there is nothing in the petition but the vague inference that, if the Grand Trunk Railway Company were not to collect and deliver freight, the carters in whose interest these proceedings are carried on might obtain an increase of business; nor is there anything to show that judgments or orders such as prayed for would be in any degree beneficial to the promoters of the present action. This line of argument bears strongly on the case, for we find that in England it is held that the Court will not interfere to grant an injunction at the instance of the Attorney-General, except in cases of manifest danger or injury to the public interests. The first case cited in support of this view was that of the Attorney-General and The Birmingham and Oxford Railway Company. (1) In that case the Lord Chancellor said: "The Attorney-General appears here in order that the defendants may be stopped from doing that which is not expressly forbidden by the act of parliament, but unless I was prepared to say that the Attorney-General is entitled, in every case where the public interests may be or are alleged to be neglected, to come into equity, I must hold that in the present case no sufficient grounds have been shown for his interference. Undoubtedly the Attorney-General has a right to represent the public, either in equity or by prosecution at law, in cases where the public inte-

(1) 7 Railway and Canal Cases, p. 972.

rests are exposed to danger or mischief; and, in the course of the argument, several authorities were cited to show that such interference is recognised in equity; but the informations, in all these cases, were directed to the repression of acts which the parties had no legal right to do, and which were not only not authorised to be done, but were, in fact, acts of public nuisance." Even where there has been a manifest violation of law, but no serious injury results, the Court of Chancery will not maintain an injunction. In the case of the Attorney-General vs. the Eastern Counties Railway Company, (1) V. C. Knight Bruce said: "I think there has been an infraction of the law, and that, too, without any favourable circumstances. No case of any great practical inconvenience has been made out, and I do not think it necessary, considering all the matters before me, nor do I think it necessarily the duty of the Court, to interfere by injunction."

In the case of Morton against the Great Eastern and Midland Railway Companies, Chief-Justice Cockburn and the other Judges expressed themselves to the following effect:—

"Cockburn, Justice:—I am of opinion that no case has been made out by the complainant for the interposition of the Court, and consequently that the rule should be discharged. I agree that to justify a party in calling upon the Court to enforce the provisions of this act, it is not indispensably necessary to show a case of individual grievance; but it is clear that a case of public inconvenience must be made out. It does not appear, even upon Mr. Barrett's affidavit, that there is any complaint of a want of sufficient accommodation on the part of the public; and it is clearly shown by the affidavits filed in opposition to the rule that no complaints have been made. I can quite understand that two competing companies may so arrange the departures and arrivals of their respective trains as to operate

(1) 3 Railway and Canal Cases, p. 337.

injuriously to the shorter line and inconveniently to the public. In such a case the Court would be justified in interposing under this act. But it appears here that abundance of accommodation is provided on the Midland line; and though the distance travelled over is somewhat longer, no additional cost is incurred, nor any materially greater loss of time sustained by the public. And one very striking fact is that the Great Northern Railway Company, the parties by far the most likely to be injuriously affected by it, so far from complaining, are satisfied with the arrangement existing, and appear by their counsel to oppose the rule. I think we must discharge the rule with costs.

Williams, Justice :—I also think that we can only be justified in interfering where it is made out to our satisfaction that the public convenience requires it. The application of the affidavit shows very slender grounds for the rule; and the affidavits filed in opposition to the rule entirely remove all shadow of pretext for the motion. If the complainant had satisfied me that public convenience did really require that which he asks, and that the accommodation sought could reasonably be granted, I should have paused considerably before I assented to the rule being discharged. But this he has altogether failed to do. Rule discharged with costs.

These decisions, in my opinion, bear directly upon the question under consideration. I think they show clearly that a case of public inconvenience or injury must be made out, and that the peculiar remedy sought by the petitioners can only be enforced in cases of public interest, and was not created for the benefit of individuals. It will not, and cannot be applied to remedy private grievances. It is true that the complainants in this case allege several instances in which it is contended that the company have violated their charter, and that these infractions of the law are the consequences, more or less direct, of their doing the business of common carters within the limits of the city of

Montreal. But I must take care that this application is made *bona fide* in the interest of the public, and in doing so, I must not only not confound the private grievances of the complainants with those of the public, if it has any, but I am bound to discriminate between the interests of individuals and those of the public. In this case the public interest seems to be at variance with that of the petitioners. The latter do not, in point of fact, suffer; they have not suffered from the company's mode of imposing and levying tolls and cartage, nor from the illegality of the company's system of carrying on their business; unless, indeed, their employing their own carters exclusively in the collection and delivery of freight and their refusal to employ the complainants be contrary to law; and this brings us to this important, really chief, point in the case.

In support of the second proposition, it is urged that the defendants do not rely solely upon the absolute want of legal interest which the public, or the private persons more immediately concerned, have in its prosecution. The defendants assert that the course adopted by them in the collection and delivery of freight at Montreal, and other places in this Province, is, in every respect, legal; that, in adopting it, they conform to the well-established usage of railway companies in England and other countries; and that, besides being supported by settled legal authority, it conduces, in a great degree, to the public convenience, and that it enhances the usefulness of the company as a public body whose interests are closely identified with those of the country at large. The question of convenience to the public is always of paramount importance in cases where the exercise of equity jurisdiction is demanded. It is to that I must make continual reference in forming my judgment upon the case presented. To establish the right of the company to convey goods beyond the limits of their road, reference was made to several authorities. Since the case of *Muschamp vs. Lancaster and Preston Railway Company*, establishing the liability of railway companies

for goods which they undertake to carry beyond the limits of their line, the right of such corporations to contract for the carriage of goods beyond the *termini* of their road has never been doubted.

Redfield on Railways, sect. 136, was then referred to, also the case of *Noyes vs. The Rutland and Burlington Railway*. (1) The grounds of the decision are thus stated: "It seems to be now well settled that Railway Companies, as common carriers, may make valid contracts to carry beyond the limits of their own road, either by land or water, and thus become liable for the acts and neglects of other carriers, in no sense under their control. (2)

"It has never been questioned that carriers, whether natural or artificial persons, might by usage or contract, bind themselves to deliver parcels and merchandize beyond the strict limits of their line, in town and country; and in such case could only exonerate themselves by a personal delivery. (3)

"It seems to us in principle, that these two propositions control the present case; for, if a Railway Company may contract for carrying merchandize and goods beyond the limits of their line, where the carriage is by porters, stages, by steamboats or other water-craft, or by other Railways, and this is to be justified upon the grounds of usage and convenience, or common understanding or consent, the same rule of construction must equally extend to contracts to receive freight at points on the line before it reaches the company entering into the contract. It may be true in one sense, that this is extending the duties and powers of the company beyond the strictest interpretation of their charter. But the time is now past when, as between the company

(1) 27 Vt. R., 10.

(2) *Muschamp vs. Lancaster and Preston Junction Railway Co.*, 8 M. and W., 421:—2 Eng. Railway Cases, 444:—*Weed vs. Saratoga and Schenectady Railway Company*, 19 Wend, 334:—*Farmers and Mechanics' Bank vs. Champ. Trans. Co.*, 23 Vt., 186.

(3) 23 Vt., 185, and cases there cited.

and strangers, any such literal interpretation of the charter is attempted to be adhered to. It is true that such Corporations, even as to strangers, are not allowed to assume obligations beyond the general objects of their incorporation, as if they should assume to build steamboats or other railways, perhaps. But, within the general business of their creation, a very considerable latitude is allowed in contracts with strangers. This is done for the advantage of the company, as well as others, and to avoid embarrassments in the common business of life, which must be constantly liable to occur upon any such limited construction of the powers of Corporations."

In *Crouch vs. the London and North Western Railway Co.*, (1) the question came before the Court of Common Pleas in a new aspect. The plaintiff sued the defendants for refusing to carry packed parcels from London to Sheffield and Glasgow. The defendants' road extended only a part of the way from London to the respective places, but they had arrangements with the intermediate companies, so that cars from their road passed over the whole distance without the interference of the other companies. The defendants were in the habit of receiving packed parcels to carry to Sheffield and Glasgow, and they had agents in the places to distribute the parcels when received. The defendants refused to receive parcels from the plaintiff to carry to these places, though they offered to carry them to the terminus of their line. The plaintiff brought an action for the refusal, and the defendants contended that they were not bound as common carriers to carry beyond the limits of their own line. But the Court held that, like natural persons, Railway Companies were bound to discharge the duties of their charters which they assumed, and if they held themselves out as carriers to a place beyond their line they were liable for refusing to carry." (2)

(1) 25 English Law and Equity R., 237.

(2) 2 Am. Railway Cases, 478, Note.

The english courts have thus refused to consider the liabilities of Railway Companies as being in any way limited to the line of their road, but hold them liable upon their contracts, which are to be ascertained by the verdict of a jury.

The doctrine that the cartage of goods may be done by Railway Companies is also well settled in France.

"Cependant, il n'est point interdit de déroger à cette faculté par des conventions particulières et de stipuler que le camionnage sera opéré par les soins de la compagnie." (1)

"La remise ou livraison des marchandises se fera donc, soit en gare, soit au domicile du destinataire, selon l'énonciation de la lettre de voiture, &c." (2)

"Lorsque l'expéditeur a fait au chemin de fer la remise de la marchandise, en indiquant le destinataire sans dire en gare, ou gare restant, à tel point désigné du parcours, il a laissé croire à la compagnie qu'elle était chargée de livrer à domicile. Or, les conventions faites par l'expéditeur doivent nécessairement lier le voiturier, aujourd'hui le chemin de fer, qui remplace l'ancien mode de transport. Ces conventions tiennent lieu de loi entre l'expéditeur et le voiturier, et ne peuvent être modifiées au gré du réceptionnaire, qui refuserait de payer le prix du camionnage." (3)

In the general tenor and rulings of these decisions and authorities, in so far as they apply to the present case, I fully concur. I am clearly of opinion that the exclusive employment of any particular carter or carters by the Grand Trunk is incidental, if not absolutely essential, to

(1) *Blanche, Contentieux des Chemins de Fer*, p. 150—*Cour de Cass.* 13 juillet, 1850, *Gibiat vs. Chemin de Fer d'Orléans*.

(2) *Ibid.*

(3) *Tribunal de commerce d'Orléans*, 11 juillet, 1849, *Rebu et Brière vs. La Compagnie du chemin de fer de Paris à Orléans*.

their business of common carriers, and that, therefore, the company does not, in this particular instance, stand charged with an illegal act. This I hold to be true under the facts proved in this case, in so far as this exclusive employment by Mr. Shedden goes. I think, moreover, that this right rests upon principles of the common law. But, by a provision in the Railway Clauses Consolidation Act, the company are empowered to do all things necessary or requisite for the more effectually fulfilling and carrying out the objects of their charter, and I incline strongly to the opinion that this is one of the means of attaining such a result, impliedly granted to the company. It has been said that although this course may be essential in other localities, yet that it is not so in the city of Montreal, where hundreds of carters are ready, willing and able effectually to perform all the cartage in collecting and delivering for the company. In point of fact, this may be true; but in my view of the law, it is clearly incidental to their business as common carriers, and if so, the company must, in the administration of the important interests confided to their charge, and in their extended responsible relations to the public, be the sole judges, whether they will follow their present system or revert to the old course of business. They collect and deliver now under special contracts with their customers. In my opinion these contracts are legal, and I cannot declare them illegal, and even if they were illegal, I could not set them aside under a proceeding like the present, so long as the public at large are not injured, and do not complain, I cannot interfere by injunction as prayed for by the petitioners. The motives of this decision, as embodied in the final judgment of record, will concisely disclose the grounds in law and in fact, upon which my refusal to issue the injunction rests.

The judgment is entered up in the following terms:—

“ Having heard our Sovereign Lady the Queen, represented by the Honorable the Attorney-General, and the

"said defendants, by their respective Counsel, as well upon
 "the merits of the petition, *requête libellée*, returned and
 "filed on the 11th day of March last past, as upon the
 "special demurrer *défense en droit* pleaded by the said de-
 "fendants to the said petition, *requête libellée*, having ex-
 "amined the said petition, *requête libellée*, the pleadings, evi-
 "dence and documents, produced and filed by the parties
 "in this cause ; and having maturely deliberated, doth dis-
 "miss the said special demurrer, and proceeding to adju-
 "dicate upon the merits of the said petition, *requête libellée* ;
 "and considering that the petitioner has not established by
 "legal and sufficient evidence, such a case of public inte-
 "rest as is required by the statute authorizing the present
 "proceeding ; considering moreover that it is not proved
 "by the evidence adduced in this cause that the complai-
 "nants have suffered, or have been directly aggrieved to
 "an extent, or from such illegal causes directly affecting
 "them, as would justify the issuing of an injunction in the
 "present case as prayed by their petition : Seeing that it
 "results from the evidence adduced that the fact of collect-
 "ing and delivering by carters, exclusively employed to
 "that effect by the defendants, is not injurious, but, on the
 "contrary, advantageous to the public ; considering that
 "the defendants have the right, as common carriers, and
 "in the prosecution of their lawful business as such, to
 "employ exclusively any carter or carters they may, in
 "their discretion, select to collect from and deliver freight
 "to their customers ; and that such exclusive employment
 "of particular carters is not a violation of their charter,
 "inasmuch as the act itself is essential or incidental to their
 "business as common carriers : Considering that no injunc-
 "tion can by law issue in this case to restrain the defen-
 "dants from illegal acts, by and from which the petitioners
 "are not shewn to have been distinctly aggrieved, and
 "which are not, at the same time, proved to be injurious
 "to the public : And considering that none of the indivi-
 "duals or parties using the defendants' road and paying

"their charges for cartage, have complained in the present case, I, the said Judge, do refuse the said petition with costs."

STUART, Q. C.)
DORION, Q. C. } for petitioners.
ROY, Q. C.

RITCHIE, for defendants.

QUEEN'S BENCH, } DISTRICT OF MONTREAL.
APPEAL SIDE.

Before :—AYLWIN, MEREDITH, DRUMMOND and MONDELET, Justices.

THE MONTREAL ASSURANCE Co.....*Appellants.*

and

MCPHERSON.....*Respondent.*

Held, in the Superior Court :—That an exception to the *la forme* on the ground of the nullity of the affidavit of service of the writ and declaration on the defendant, described in the writ as "of Toronto, in the Home district of Canada West," will be maintained, and the action dismissed, the affidavit stating the service to have been made on the defendant by delivering copies of the said writ and declaration to the wife of the defendant, "of the Township of York, in the county of York, at his place of residence in the said Township of York."

In appeal :—Judgment maintained on the ground that the service as made was contrary to the provisions of the Cons. Stat. of L. C., chap. 83, sec. 93.

Jugé, dans la Cour Supérieure :—Qu'une exception à la forme fondée sur la nullité de l'affidavit de la signification du writ et de la déclaration sur le défendeur, déignée au dit writ comme étant "de Toronto, dans le Home district du Canada Ouest," sera maintenue et l'action renvoyée, l'affidavit énonçant que la signification avait été faite sur le défendeur en délivrant copie des dits writ et déclaration à la femme du défendeur, "dans le Township de York, dans le comté de York, à son lieu de résidence dans le dit Township de York."

En appel :—Jugement confirmé par la raison que la signification telle que faite était contraire aux dispositions du Stat. Ref. du B. C., Stat. 83, sec. 93.

Judgment rendered the 9th December, 1865.

The action was brought on promissory notes and vouchers, the defendant was described in the writ and declaration as "now of Toronto, in the Home district of Canada West."

The affidavit of service, under the Cons. Stat. of L. C., chap. 83, sec. 94, was that the deponent "served the writ

" of summons and declaration thereto attached on the defendant on the 7th day of February, 1863, at the Township of York, in the county of York, in the province of Upper Canada, about the hour of half past nine o'clock in the forenoon, by delivering to Mrs. David L. McPherson, the wife of the said defendant, at his place of residence in said Township of York, true copies of the said writ and declaration, &c."

An exception *à la forme* was filed on the ground, amongst others, that the affidavit shewed no legal service on the defendant not having been made personally or at his *domicile*, and praying that the writ and process be declared null and of no effect, and that the defendant be hence dismissed with costs. The plaintiff answered to the effect that the defendant having appeared, was bound to answer according to the exigency of the writ; that the *demande*, service, and return were sufficient, and that the exception was in bad faith, in order to invoke the statute of limitations, in case the exception should be maintained, and in the event of another suit. One witness was examined on behalf of the plaintiffs, who stated: " The defendant's residence is the township of York, in the Home district, and his office or place of business is in the city of Toronto, said city is chiefly within the limits of the Township of York. Defendant's residence is in Yonge street, one of the streets extending through the city of Toronto."

Judgment on the exception, the 26th May, 1863.

MONK, Justice :—" Considering that it doth not appear by the return or certificate of service made by the person entrusted with the service upon defendant of the writ and declaration in this cause, that any legal or sufficient service of such writ and declaration was made upon or to the defendant or at his domicile in the city of Toronto, as by the exigency of the writ should have been made : Considering further that the return or certificate of service made by

Henry Smith, dated seventeenth February, one thousand eight hundred and sixty-three, is irregular, illegal, null and void."

"The Court doth maintain the said *Exception à la forme* and doth dismiss plaintiffs' action with costs."

CROSS, Q. C., for appellant:—Nothing is brought into question but the sufficiency of the service, and there are no conclusions or any demand whatsoever for the nullity of the service.

The affidavit of service is verbatim, with that given in the statute, with the exception that the word *residence* is used in place of the word *domicile*, the former being a more specific and restricted term than the latter, which includes it, the statute not requiring any specific form of words.

The affidavit of service must be judged of without reference to the writ, the respondent has purposely not objected to his designation as of Toronto; had he done so, the appellants would have moved to amend the process, but by attacking the service made at the township of York, respondent's true residence, and leaving unquestioned his description in the writ "*of Toronto*," hopes to avail himself of a contradiction which really does not exist, the respondent having proved that the place in the township of York, where the respondent resides, is within Toronto.

An exception of the kind, pleaded when manifestly made to get the benefit of the statute of limitations, is precisely the case the Courts have treated with the greatest disfavor.

RITCHIE, for respondent:—The law permitting service in Upper Canada contemplates that it shall be either *personal* or at the *domicile* of the party summoned. The form prescribed by the act states that the service shall be "by delivering to him *personally* a true copy, &c., or, by leav-

"ing a true copy thereof for the said C. D. with a grown up person of his family, at his domicile, &c." The service would have been insufficient had it been stated to have been made at the residence of the defendant in Toronto. Taking the affidavit to be true, and its truth is in no way impugned, the pretended service has been made at a place different from the residence and domicile of the defendant, as established by the issue raised upon the pleadings.

The only course open to the plaintiffs, seeing the manifest incompleteness of the return, was to shew, if such had been the fact, that the residence of the defendant in Toronto was also within the township of York, in other words, that the place of service was identical with the residence and domicile established by the writ and declaration. Unfortunately for the plaintiffs such is not the fact. The residence and domicile described in the plaintiffs' declaration are not in the township of York. The plaintiffs, however, feeling that the affidavit of service was worthless, endeavoured to support it. But by what means? By examining a witness to prove that the allegations of the writ and declaration were false, and that the defendant resided in the township of York, and not in the city of Toronto. This was manifestly illegal and irregular, and the deposition of the plaintiffs' witness was properly rejected. The plaintiffs are bound by their own allegations, and could not adduce evidence contradicting these allegations, and for a useless purpose too, that of supporting an affidavit of service, the truth of which was not denied by the defendant.

Unless it be held that service may be made at a place wholly different from that described in the writ and declaration as the residence and domicile of the defendant, the respondent conceives that the judgment appealed from must be confirmed. No legal service upon him has been proved in the manner required by law, and none, in the

the face of his denial of the fact, can be presumed in the absence of such proof.

DRUMMOND, Justice:—Thought the service was insufficient, the Court did not express any opinion about the difference between residence and domicile. In his opinion there was a great difference between the meaning of the two words. A man might have a country residence, and yet his legal domicile be elsewhere. The statute required a personal service, or a service at domicile. In this case the law had not been complied with, and, notwithstanding the hardship which might be experienced, from prescription being acquired, the judgment below would be maintained.

MONDELET, Justice:—Held the extension of time illegal as being beyond the power of the Court. The affidavit shewed the service was insufficient, the service at a residence was by no means the same as at a domicile.

Judgment.—In appeal: Seeing that the service of the writ and declaration is insufficient, and is contrary to the 63 section, of the 83 chapter, of the Consolidated Statutes of Lower Canada, page 783, the Court doth affirm the judgment rendered in the Court below.

MEREDITH, Justice, dissenting.

CROSS & LUNN, for appellants.

ROSE & RITCHIE, for respondent.

COUR DE CIRCUIT.—QUÉBEC.

Présent :—TASCHEREAU, Juge.

No. 581. { SHEPPARD.....Demandeur.
 vs.
 LE MAIRE, LES CONSEILLERS ET LES
 CITOYENS DE QUÉBEC.....Défendeurs.

Jugé : 1o.—Que la corporation est obligée d'entretenir un chemin sur le pont de glace vis-à-vis la ville, et que les défendeurs sont tenus à l'entretien de tout autre chemin pratiqué par d'autres, s'ils le permettent ou ne l'empêche pas.

2o. Que si la corporation tolère un autre chemin que le sien, elle est responsable de son entretien, de la négligence de ses employés qui ont pour devoir de tenir ce chemin en bon ordre, de manière à ce qu'il soit praticable sans danger.

Held :—1o. That the corporation is obliged to keep up a road upon the ice bridge opposite to the city, and that the defendants are bound to keep up any other road opened by other people, if they permit or do not prevent it.

2o. That if the corporation tolerate another road but its own, the defendants are responsible for its being properly kept up, and of the negligence of their servants whose duty it is to keep such road in good order, in such way that it may be used without danger.

Jugement rendu le 25 novembre, 1865.

TASCHEREAU, Juge :—Le demandeur réclame par son action des dommages au montant de 20 louis, pour le danger qu'il a couru le 26 de février dernier, en traversant le pont de glace devant la ville, le bris de sa voiture et l'impossibilité où il a été de se servir de son cheval pendant plusieurs jours après l'accident dont il se plaint, et qui est arrivé par suite de la mauvaise construction du ponton qui liait la glace au rivage. En réponse, la corporation a plaidé que ce chemin était un chemin de souffrance, qu'elle n'était pas tenue de surveiller avec autant de vigilance que le sien propre ; que quelques heures auparavant l'accident, ce chemin était en bon ordre et que ce n'était que la marée haute qui avait pu le rendre dangereux. Les personnes appelées comme témoins prouvent qu'il n'y avait pas de lumière sur le ponton ainsi que cela devait être, et qu'en conséquence de la haute marée, il était facile de prévoir que le ponton ne pourrait pas résister solidement à la crue des eaux. La première question est de savoir si les défendeurs doivent être tenus responsables du chemin dont il s'agit. Je dirai de suite qu'ils ne sont

tenus qu'à l'entretien d'un seul chemin, et que personne ne pourrait les forcer à en construire d'autres une fois qu'ils en auront choisi un, quelqu'il soit. Mais si, pour plaire à quelques individus, ils souffrent qu'il y en ait d'autres, ils deviennent dès lors, s'ils ne protestent pas contre leur ouverture, responsables de tous les accidents qui peuvent arriver par suite de leur mauvais entretien ; c'est aussi ce qu'ils paraissent avoir compris en plaçant certains de leurs employés pour en avoir soin, mais la manière dont ils se sont acquittés de leurs devoirs, prouve que c'est en partie de leur faute si l'accident est arrivé. En effet, un homme était chargé de tenir une lumière sur le ponton, et cependant la preuve faite en cette cause démontre qu'il n'y en avait pas, et comme les défendeurs sont responsables de leurs employés, ils doivent souffrir des dommages arrivés par leur négligence. Les défendeurs devaient de plus voir à ce que le ponton construit à l'entrée du pont de glace fut solidement lié et enchaîné pour qu'il ne se brisa pas à la crue des eaux, cependant il est prouvé qu'il n'était attaché qu'avec des cordes entièrement impuissantes à résister au pouvoir de la marée. Les défendeurs ne peuvent pas alléguer ignorance de leur part du danger que courrait ce ponton d'être déplacé, car tout le monde connaît la régularité de la marée, et sait si elle doit monter très-haut ou à hauteur ordinaire, et comme il est prouvé qu'il était évident que ce ponton ainsi lié et attaché ne pourrait résister, elle aurait dû par quelque moyen que ce fut prévenir le danger, soit en le fixant solidement ou en empêchant la circulation dans ce chemin. Il n'est donc que juste que les défendeurs souffrent de leur négligence et que le demandeur soit indemnisé des dommages qui lui en sont résultés ; c'est pourquoi la Cour condamne les défendeurs à dix-sept louis de dommages, et les frais.

BOSSÉ et BOSSÉ, pour le demandeur.

PELLETIER, pour les défendeurs.

SUPERIOR COURT.—QUEBEC.

IN REVIEW.

Before :—BADGLEY, STUART and TASCHEREAU, Justices.

HAMEL *et al.*.....*Plaintiffs.*

VS.

THE MAYOR *et al.*.....*Defendants.*

Held :—1o. That riparian proprietors on adjacent lots, but holding under the same original title, may make such compacts or stipulations with respect to the use of the water of the stream or river flowing along their properties respectively as they may think proper.

2o. That the natural use of flowing water, under the common law, cannot be restricted by artificial means, or by the agreements or stipulations of riparian neighbours.

Jugé :—1o. Que les propriétaires riverains de lots voisins, mais possédant en vertu du même titre original, peuvent faire tels contrats ou stipulations qu'ils jugent à propos quant à ce qui concerne l'usage de l'eau d'une rivière ou d'un cours d'eau coulant le long de leurs propriétés respectives.

2o. Que l'usage ordinaire de l'eau courante, ne peut être restreint, d'après la loi commune, par des moyens artificiels ou par les conventions ou les stipulations des voisins riverains.

Judgment rendered the 14th June, 1865.

The matter at issue between the parties in the cause was in relation to their respective rights to the free use of the water of the river St. Charles.

In the Superior Court, by judgment rendered on the 4th of February, 1865, the defendants' pretensions were maintained—Taschereau, Justice, presiding—and it was on a review of that judgment that the present decision was given.

By the decision in review the judgment of the Superior Court was confirmed, and the facts of the case are fully set forth in the observations of BADGLEY, Justice, in rendering the judgment in review.

BADGLEY, Justice :—The contention is between two mill-owners respecting the water of the river St. Charles, by which both mills are worked.

By grant of the 2nd September, 1853, Falardeau, the then tenant, became the grantee of some Crown property in the

parish of St. Ambroise, whereon was erected the Banal-Mill of *La Jeune Lorette*. The lot was of almost square figure and contained a superficies of $1\frac{1}{2}$ arpent. The only boundaries connected with this contention are those of the south and south-west, "bounded on the south and south-west by the river St. Charles." In the grant were included the Flour-Mill, (the said Banal-Mill, but without the right of *Banalité*) the Saw-Mill and other buildings erected on the granted land.

In addition to the realty, the grant specially conveyed to the grantee "the right and privilege of using the water of "the river in and on the sides of the said lands for the "working of mills, &c., established or to be established "thereon, appurtenances, &c."

At the time of the grant, both mills were worked by the water of the river supplied to each independently, the Saw-Mill towards the south-west bank of the river receiving the water by the *ancienne dalle*, which tapped the river considerably above the position of the Flour-Mill, and which was discharged into the natural ravine without serving the Flour-Mill, situated on the south bank of the river, whilst the latter received the water from the river by the *dalle du moulin*, which tapped the river at some distance below the entrance of the *ancienne dalle* and discharged its water through the Flour-Mill into the river directly in front of it.

Falardeau had been for sometime previously to the grant tenant in the useful demesne and occupation of the premises granted.

By deed of sale of the 27th June, 1854, Falardeau, the grantee, conveyed to Willis Russell a considerable portion of his grant, described as bounded "on the south and south-west by the river St. Charles, including the point of rock "extending towards the south and separated from the lot by "a natural ravine together with the said ravine, towards the

"south by a line drawn diagonally from the point or angle
 "of the flume existing for the Flour-Mill to the east corner
 "of the building intended for a Paper-Mill, &c."

Together with the realty, Falardeau sold to Russell all his right to use the water of the river in and on the sides of the said lot of land for the purpose of working mills, &c., which might be established there, and in addition all other rights to use the water of the river, or to prevent the use thereof by others to which he, Falardeau, might claim or pretend to have right in virtue of his grant, but "with the
 "exception and reserve of the use of sufficient water of the
 "said river to drive three run of stones for the Flour-Mill to
 "be taken as the vendor now takes it," or "by such other
 "means as will produce the same motive power, provided
 "such change be made at the expense of the said Russell;
 "but not to guarantee such water to be sufficient unless
 "he, Russell, build thereafter on the south-west or opposite
 "side of the river."

This property and these different rights acquired by Russell, were divested from him by *décret*, and adjudicated to the defendants, on the 17th September, 1857. The remaining portion of the original grant, with the Flour-Mill erected thereon, and the said reservation of the use of sufficient water for three run of stones were afterwards, in the year 1858, adjudicated to the Messrs. Hamel as sole proprietors.

The parties in contention in this case are therefore respectively in the positions of Falardeau and Russell, and are both holders under title; as such therefore their contention must in the first place be considered as titular proprietors.

Daviel, No. 985, says: "Les actes des propriétaires réglant
 "l'exercice de l'eau entr'eux sont obligatoires entr'eux et
 "leurs ayans cause, et l'appréciation du droit qui peut ap
 "partenir à l'un des propriétaires qui se partagent les eaux,

“ de modifier le régime de son usine, est essentiellement
 “ une question judiciaire, puisqu'elle se décide par l'examen
 “ des titres, etc. Ainsi lorsqu'en transmettant l'usage d'un
 “ volume d'eau, le vendeur a stipulé certaines conditions
 “ pour l'exercice du droit qu'il se réservait lui-même sur le
 “ cours d'eau, le tribunal peut par l'application du contrat
 “ régler la jouissance des eaux entre le vendeur et l'ache-
 “ teur, en prescrivant les travaux d'art nécessaires confor-
 “ mément aux conventions des parties.”

Now what was the position of the parties Russell and Falardeau? By his deed, Falardeau subdivided his original grant into two parts, the northern and south eastern portion sold to Russell, was in locality the superior and higher ground, the southern retained by himself, the inferior and lower ground; and the Flour-Mill erected at the lowest part of the latter could not be worked by the natural current of the river, and could only be operated upon by artificial means passing through the portion conveyed to Russell under the agreement of the deed itself. Again, the deed conveyed to Russell not only all Falardeau's rights to use the said water of the river, but also all rights whatsoever to use the said water, or to prevent the use thereof by others to which he Falardeau might lay claim in virtue of his grant.

It is manifest from the extreme generality of these terms of conveyance, that the water rights and privileges conveyed, covered all Falardeau's riparian and aquarian rights and privileges in the river generally, actually and possibly, applicable to it as water power and specially the use of the water of the river generally, for the purpose of working mills and manufactories, to be established upon the land sold, and not a particular mill or one of particular dimensions and power.

Falardeau therefore could not interfere with the generality of his own conveyance, except to the extent of the

reservation in his favour stipulated by the deed, and to that extent alone ; without this reservation he could have had no water at all, and this is shewn by the situation of the locality and the position of the mill. The current of the river running along the south-west side of the land described, was a gradual fall from the north-west corner of the lot, until the turn of the river along the south front on which the Flour-Mill was erected. First there was a descent of from 8 to 10 feet from the north-west corner to the *ancienne dalle* for the use of the Saw-Mill, then one of about 12 feet more to the *dalle du moulin*, which was located at the head of the rapids, and thence a running fall of 45 feet through the rapids to the smooth water in front of the Flour-Mill ; the original grant or lot from its northern boundary to its southern front gradually trending down in the same way, so that the water, as Falardeau then took it, was received from the river at the head of the rapids and carried through a descending sluice or *dalle de moulin* and delivered into the garret of the mill through the roof. Now Falardeau placed himself in that inferior and dependant position, he divested himself absolutely of all right or privilege in the water of the river, and excluded all other persons from its use as well as himself, except for the sufficient water to drive three run of stones, thereby making his reservation subsidiary to the main, superior and dominant aquarian right and privilege conveyed by him to Russell ; but even this sufficiency of water was subjected to further modification in his own disfavour by his own stipulations, because after stating, " with the exception and reserve of sufficient water to drive three run of stones, &c., to be taken as he then took it," it is added, " or by such other means as would produce the same motive power," provided such change be made at Russell's expense, but not to guarantee such water to be sufficient unless Russell should thereafter build on the other side of the river, that is, Falardeau reserves sufficient water to drive three run of stones as he then took it, but Russell was not to guarantee the sufficiency

of the water if he did not build on the other side of the river.

The plaintiffs in their special answer admit this application of the stipulation, and its effect must necessarily involve the relief of Russell and his *ayans cause*, the defendants, from all liability in case of any insufficient supply of the water through the manner or way that Falardeau then took it.

The contingency from which the guarantee might be claimed has never arisen.

Moreover, the want of guarantee was not unreasonable under the consideration that the river itself did not contain a large current, that at certain seasons it diminished in volume to an extraordinary degree, that the vendor's conveyance of the right and privilege for the water generally was for the purpose of working any number of mills and manufactories without limitation of extent or power, and that moreover the mode of delivering the sufficient water for the Flour-Mill might be changed from the manner he then took it, by such other means as would produce the same motive power, but at the expense of the vendor.

Considering the matter in dispute then between the parties under their respective titles, the plaintiffs are plainly and manifestly restricted to the simple privilege of having the sufficiency of water above mentioned, but without guarantee by the defendants, the *ayans cause* of Russell, and their claim even in that respect for that sufficiency can only rest upon the wilful malfeasance of the defendants in their illegal diversion of the natural course of the stream from the purposes stipulated and contemplated by the deed of conveyance, in the unnecessary waste of the water or in its wanton detention longer than was necessary or reasonable, and these malfeasances must have been done during the interval, between the plaintiffs becoming the sole pre-

prietors of their lot and Flour-Mill, on the 29th April, 1858 and the 25th January, 1859, when the writ in this suit was taken out, but none of these things have been satisfactorily established. No such demand as this could by any legal chance have been made by Falardeau, in the face of his general conveyance of the water, because it is a principle of law that when the use of a thing is granted, everything is granted by which the grantee may have and enjoy such use, and it is clear that the use of the water of the river in general was essentially necessary for the enjoyment of the thing granted, that is, it was necessary for the working of the Paper-Mill and factory established on the conveyed land. The plaintiffs then under their title are restricted to the mere requirement of the delivery to them of the sufficiency of water reserved, and beyond that have no claim whatever to the water of the river generally, nor to the demolition of the works as demanded.

But they seek to enforce their demand under the common law, by which they claim of right the use of the water of the entire river, and the demolition of the works referred to.

It seems that the defendants, by deed of *promesse de vente*, of 22 September, 1857, put Mr. McDonald into possession of the purchased estate, who, finding the supply of water by the *ancienne dalle* insufficient for the working of the Paper-Mill and factory established on the conveyed land during the years 1858 and 59, constructed a dam at some short distance beyond the north boundary of their lot and conveyed the water therefrom to their factory, and also enlarged the *ancienne dalle* and built a dam there also for the purposes of their factory. It is of these works that the plaintiffs complain under the common law, and, in their declaration, they declare that being the proprietors of their said property and rights they are entitled to have, and of right ought to have, the use, benefit and advantage of the water of the said river for the working of the said Flour-

Mill, as well as water sufficient to drive three run of stones for the said Flour-Mill, as stated in the deed from Falardeau to Russell as above. They complain that these new works by which the water is diverted to the working of the Paper-Mill have decreased the sufficiency of the water for the Flour-Mill, which they ought to have had, and have diminished the rapidity of the water flowing through their *dalle du moulin* and subjected it to be impeded by the formation of ice, and all this since 1858, to their damage of £500.0.0. Wherefore, they pray for the demolition of the said dams and the closing up of these new channels for the supply of water to the Paper-Mill, and that, upon the defendants' failure to do this, they the plaintiffs should be authorized to do it at the defendants' expense, in order that they the plaintiffs might have the use of all the waters of the said river for their said mill, without any diminution whatever, &c., &c.

The defendants' plea sets out the original crown right over the land granted and the river on the two sides thereof, the conveyance of those rights and property to the Mayor, *et al*, through Russell, and his superior and exclusive right to the said water with the limitation in plaintiffs' favor of the water for three run of stones, or as should be given to them by Russell's successors; that the defendants have given sufficient water for three run of stones and have tendered to the plaintiffs to make the changes in the Flour-Mill machinery at their expense to drive three run of stones, and to provide sufficient water for the same, all which the plaintiffs have refused to accept or allow, that plaintiffs have no right to all the water of the river as demanded, nor to have the demolition of the new works; finally, ending with a plea of denegation of facts, &c. As matter of fact, Russell did erect a Paper-Mill upon the land conveyed to him and did utilize the water of the river for the purposes thereof, all which existed at the time of the adjudication to the defendants, and it is also a fact that the new works complained of were in existence at the institution of the suit. Now,

under the common law, both mill owners must be in a position to use the aquatic power naturally, it would be inconsistent with every legal principle that a right under the common law alone and for the natural use of flowing water, should rest upon conventional stipulations made by the parties with reference to artificial means of supply; these conventional and artificial means must be altogether put aside and the locations to be effected under the common law, must be left in the natural position of each in relation to the water power or stream.

But the parties in this case are not in the position of such joint proprietors or users of running water, the stream does not naturally flow through the superior to the inferior land or property, nor does it flow in any naturally useful manner where it can be applied naturally to the inferior location; its useful portion passes along the riparian property of the superior lot, and all the water, whether taken from the new dam or passing along the sides of the river, is discharged into the stream before it reaches the Flour-Mill where it cannot by any possibility be made a motive power at all except by steam, or other artificial means.

This is not a question of first occupancy or prescriptive right whereby a property in the course of a river is acquired, but it is in fact the question of the superior right of the defendants under their superior location, and here again there appears no color to charge them in the exercise of their use of the water with having illegally diverted the natural course of the stream, as regards the location of the Flour-Mill, or of having unnecessarily wasted the water or wantonly detained it longer than was reasonable or necessary for their own machinery and water works. Although some conflict may be produced in the use and enjoyment of undivided rights under the common law in the natural water, it cannot by the judgment of law, be considered an infringement of the right. If it become less useful to one, in consequence of the employment of another, it is by accident

and because it is dependant on the exercise of the equal rights of others; if therefore the use of the right be reasonable, no action can lie. This is the decision of English Jurisprudence; the French Jurisprudence is not unlike it: " Il résulte des principes du Droit Romain admis dans nos coutumes que le propriétaire ne peut être attaqué s'il ne fait que retenir les eaux pour les besoins de son industrie en profitant à cet égard de sa position sans en abuser à l'exercice et usage."

" L'exercice d'une faculté légale ne peut être prise pour un trouble,"—so says Daviel, so that by the common law also, the plaintiffs' pretensions are ill-founded and cannot be maintained.

Judgment.—The Court, &c.—Considering that in the Judgment complained of there is no error, doth maintain and affirm the said judgment, with costs, &c.

STUART, Q. C., for plaintiffs.

VANNOVOUS, for defendants.

BANC DE LA REINE, } DISTRICT DE QUÉBEC.
EN APPEL.

Présents :—DUVAL, Juge-en-Chef, AYLWIN, MEREDITH,
DRUMMOND et MONDELET, Juges.

COTÉ.....Appelant.

et

MASSE, et al.....Intimés.

Jugé :—Qu'une demande en reprise d'instance de la part de celui tenu de la reprendre, doit être formulée par requête ou par motion, et non par un writ de sommation contre l'autre partie à la cause.

Held :—That a *demande en reprise d'instance* by the party held to take it up, must be made by petition or by motion, and not by action against the other party in the cause.

Jugement rendu le 18 septembre, 1865.

Les procédures en Cour Inférieure avait été interrompues par le mariage de Sarah Côté, la demanderesse, avec

F. X. Masse, l'intimé, et il était en conséquence nécessaire que le dit F. X. Masse reprit l'instance conjointement avec la demanderesse. Les intimés firent émaner un bref de sommation "pour voir dire le dit défendeur, que l'instance ci-devant pendante devant la Cour sera et demeurera reprise entre lui et les demandeurs en reprise d'instance." Le défendeur en Cour Inférieure répondit à cette action par une défense au fonds en fait. Le 25 février, 1865, un jugement accordant aux demandeurs les conclusions de leur demande fut rendu.

C'est de ce jugement qu'il y avait appel.

L'appelant prétendit qu'une action étant l'exercice d'un droit en justice, il n'était pas nécessaire d'intenter une poursuite contre lui pour permettre aux demandeurs de reprendre l'instance suspendue par le changement de qualité de l'un d'eux, mais que cela aurait dû être fait comme il est d'usage, par motion ou par requête; une procédure aussi nouvelle et si peu raisonnable ne devait pas être permise par cette Cour.

L'intimé demanda lui-même la révision du jugement.

La Cour :—Considérant que les intimés n'ont fait aucune preuve quelconque des allégations de la déclaration produite en cette cause :

Considérant de plus que le writ de sommation émané en cette cause à la poursuite des intimés et l'action en reprise d'instance par eux portée contre l'appelant, sont des procédures illégales, irrégulières, et opposées à la pratique des cours de justice dans le Bas-Canada, cette Cour annule et met de côté toutes les procédures adoptées depuis l'enfilure de l'exception péremptoire produite en cette cause.

FOURNIER et GLEASON, pour l'appelant.

SUPERIOR COURT.—QUEBEC.

Before:—TASCHEREAU, Justice.

No. 1970. { KELLY, *et al.*.....*Plaintiffs.*
 vs.
 { O'CONNELL*Defendant.*

Held:—That on a plea of want of consideration to an action on a promissory note, the defendant will be bound to produce the affidavit required by the Con. Stat., L. C., cap. 83, sec., 86, sub.-sec. 2.

Jugé:—Que dans une action sur billet promissaire, le plaidoyer que le défendeur n'a reçu aucune valeur, devra être soutenu de l'affidavit requis par le Stat. Ref. du B. C., cap. 83, sec. 86, sous-sec. 2.

Judgment rendered the 8th of March, 1866.

The action was instituted for the recovery of \$254, due on the defendant's promissory note in favor of the plaintiffs, alleged to have been given them for value received; which words "*for value received*," appeared on the face of the said note. This note was signed by the defendant, with his own signature alone. To this action, the defendant pleaded by perpetual exception, the following facts: That he, the defendant, had been acting as the agent of another firm at the time of the making and signing of the promissory note declared upon; that he had purchased timber from the plaintiffs in his said capacity of agent, and this to the knowledge of the plaintiffs; that in his said capacity of agent, he had signed the note in question, in payment of the timber so purchased from the plaintiffs, but that he had personally never received any consideration or value for the said note, except in his quality of agent.

The plaintiffs at the *enquête* objected to the defendant being allowed to go to proof on his plea, inasmuch as the plea had been filed without the affidavit required by the 86 sec. of the 83 cap. of the Con. Stat., L. C., in which it was enacted: "That if in any such action, any defendant
 "denies his signature or any other signature, &c., to or
 "upon such bill, note, &c., or the genuineness of such
 "instrument or of any part thereof, such instrument and

"signature shall nevertheless be presumed to be genuine, &c., unless with such plea there be filed an affidavit, that such instrument or some material part thereof, are not genuine, &c., and in what the alleged irregularity consists."

The Court held that the production of this affidavit was necessary.

The defendant thereupon moved to amend his plea by filing the requisite affidavit. No cause having been shewn against this motion, it was granted by the Court, on the payment to the plaintiffs' attorney of a fee of fourteen dollars.

GOWEN and LLOYD, for plaintiffs.

HEARN, JORDAN and ROCHE, for defendant.

QUEEN'S BENCH, } DISTRICT OF QUEBEC.
APPEAL SIDE.

Before :—AYLWIN, MEREDITH, DRUMMOND and MON-
DELET, Justices.

BELL.....*Appellant.*

and

STEPHENS.....*Respondent.*

Held :—That an attorney, representing no party in a cause, at the time of filing a factum signed by him, may nevertheless file such factum.

Jugé :—Qu'un procureur, ne représentant aucune partie dans la cause, à l'époque de la production d'un factum signé par lui, peut néanmoins produire tel factum.

Judgment rendered the 18th December, 1865.

The action was instituted in the Superior Court, at Quebec, and the defendant (appellant) was represented by Mr. C. T. Suzor as his attorney *ad litem*. Judgment was rendered against the defendant in the Superior Court, and from that judgment the defendant instituted an appeal, being still represented by Mr. Suzor, the attorney who had represented him in the Lower Court. The record upon

being sent up to the Court of appeals, was found to be incomplete, and it was, upon the issuing of a writ of *certiorari*, and the return thereto, completed on the 13th of September, 1865.

The appellant having neglected to file his *factum*, the respondent, on the 20th of October, 1865, served a notice that he would, on the first day of the then ensuing term of the Court of Queen's Bench, appeal side, move : " That " inasmuch as the appellant hath neglected to file his " *factum* in this cause within the delay required by " law, this Court deem the suit in appeal of the said appellant in this cause to be deserted, and that the same " be disallowed with costs." This notice of motion was filed of record on the 22nd of November, 1865.

On the 6th of December then next, Mr. A. Gagy filed a *factum* in the cause signed " A Gagy, for appellant," he not then being the attorney of record of the appellant, not having been substituted to Mr. Suzor, whose name still appeared upon the record as the attorney representing the appellant in the cause.

On the 13th December, pursuant to notice given the respondent on the 7th, the appellant moved for the substitution of Mr. Gagy to Mr. Suzor, as his attorney *ad litem* to prosecute his said appeal. The substitution having been allowed by the Court, Mr. Gagy became on that day the appellant's attorney.

On the same day, the respondent, pursuant to her notice of the 20th October, moved the Court to disallow the appeal and declare the same deserted owing to the failure on the part of the appellant to produce his *factum*.

In support of her motion the respondent urged that the appellant had failed to produce his *factum* within the time prescribed by law, and that the printed paper called appellant's *factum*, which had been subsequently filed, having

been signed by an attorney who at the time did not represent the appellant, could not be regarded by the Court as the appellant's factum. If it could, the attorney of record could be changed without notice to the adverse party, who would be left in ignorance as to how the paper in question should be treated.

Take nothing by motion.

SUZOR, for appellant.

GUGY, substituted for appellant.

CAMPBELL & HAMILTON, for respondent.

SUPERIOR COURT.—MONTREAL.

IN REVIEW.

Before :—BADGLEY, BERTHELOT and MONK, Justices.

No. 829.	{	CHARBONNEAU..... <i>Plaintiff.</i>
		vs.
		THE CORPORATION OF THE PARISH OF ST. MARTIN..... <i>Defendant.</i>

In an action by the representatives of a deceased person, against the municipality of a parish, to recover damages for his death by an alleged unsafe and perilous winter road, causing the upsetting of a sleigh:

Held:—1o. That where the death is caused, or largely contributed to, by the imprudence and rashness of the deceased, the action cannot be sustained.

2o. That, in the case submitted, there was such imprudence and rashness on the part of the deceased in going with a very heavy load of *bois de longueur*, about midnight, in a dark night after a storm on the previous day; and in leaving the middle of the road, whereby the sleigh got into the ditch and was upset, falling upon the deceased and killing him on the spot, whilst he was trying to bear up the load with his shoulder.

Dans une action par les représentants d'une personne décédée, contre la municipalité d'une paroisse, en recouvrement de dommages allégués avoir été causés par l'état périlleux d'un chemin d'hiver, faisant renverser un traîneau :

Jugé:—1o. Que dans le cas où la mort a été causée en tout ou en partie par l'imprudence et l'imprévoyance de la personne décédée, l'action ne peut être maintenue.

2o. Que, dans l'espèce, il y avait telle imprudence et imprévoyance de la part du défunt en allant avec un voyage très pesant de bois de longueur, vers minuit d'une soirée obscure, après une bordée de neige la journée auparavant; et en laissant le milieu du chemin, en raison de quoi le traîneau s'était engagé dans le fossé et y avait versé, tombant sur le défunt et le tuant sur la place, pendant qu'il faisait des efforts pour soutenir son voyage.

Judgment rendered the 31st December, 1866.

BADGLEY, Justice :—This cause was inscribed by the plaintiff for the review of a judgment rendered in this

Court on the 25th April, 1865, which dismissed the plaintiff's action. The judgment will be confirmed, and for the reasons given by me in rendering the original judgment.

The action was brought by the widow Bouchard, personally, and as tutrix to her children, to recover damages for the death of her husband occasioned in January, 1860, as is alleged from the unsafe and perilous state of the winter road, leading from the *Barre à Plouff*, behind the Island of Montreal, to the village of St. Martin.

The plea admitted the death of the plaintiff's husband on the day in question, but alleged that it was caused by the imprudence and negligence of the deceased, and not from any negligence of the defendants.

The case is one of evidence. It appears that, on the day before his death, the deceased, accompanied by a young man, went from Montreal to St. Eustache, with a span of horses and sleigh, passing along the road in question between 5 and 6 o'clock on the Saturday, and returning to St. Martin from St. Eustache at about midnight on Sunday, with a heavy load, of what is called *bois de longueur*. They stopped a little while at a tavern. Within less than a quarter of a mile, after leaving St. Martin, the sleigh upset, the deceased was caught between the load and the fence, and was killed on the spot.

But the accident did not arise from the bad state of the road, but chiefly through the imprudence and rashness of the deceased.

The night is shewn to have been pretty dark and snow had fallen during the day; the load was a very heavy one, and from the traces on the snow, sworn to by the defendants' witnesses, the deceased left the usual track in the middle of the highway, between the two fences, and the first pair of runners got into the ditch, on the left hand side of the road and the sleigh upset, being what is called

a *bob sleigh*, with two sets of runners. The young man, who accompanied the deceased, states that when they came to the place of the accident, the deceased told him to go to the other side of the sleigh and pull on it, and that, the deceased then set his shoulder against the wood on the sleigh, pushing against it and trying to bear it up, but that the load was too heavy, and that the deceased had no room or opportunity of escaping.

In all this, there was imprudence and negligence on the part of the deceased, which if it did not wholly cause the death, largely contributed to it, and would prevent a recovery of damages. There is evidence also that the road was not in a dangerous state, had ordinary precaution been taken.

Judgment of Superior Court, 25th April, 1866 :

BADGLBY, Justice :—" Considering that the plaintiff hath not established the material allegations of her declaration. And considering that the said Olivier Bouchard, the plaintiff's husband, came to his death by his own negligence and imprudence, the Court doth dismiss the said action, with costs."

Judgment in review, confirming judgment of the Superior Court.

ARCHAMBAULT, C. and F. X., for plaintiff.

ROBERTSON, Q. C., for defendant.

BANC DE LA REINE, } DISTRICT DE MONTRÉAL.
EN APPEL.

Présents:—DUVAL, Juge-en-Chef, AYLWIN, MEREDITH,
DRUMMOND et MONDELET, Juges.

DUPONT, *et al.*..... *Appelants.*

et

GRANGE..... *Intimé.*

Jugé:—Que l'action hypothécaire est de sa nature une action réelle, conséquemment sujette à appel, et que les parties ont droit de faire rédiger l'enquête par écrit.

Held:—That the hypothecary action is of its nature a real action, and therefore appealable, and that parties thereto have a right to have the *enquête* reduced to writing.

Jugement rendu le 8 septembre, 1865.

L'action était portée devant la Cour de Circuit, dans le comté de Soulanges, par Thomas Grange, l'intimé, contre un nommé Olivier François Prieur, pour faire déclarer un immeuble possédé par Prieur, hypothéqué au paiement d'une somme de \$77, montant en principal et intérêt d'un jugement obtenu par l'intimé, contre un nommé Jean Régis Leblanc, le 14 mai, 1855.

Prieur appela en cause les appelants Dupont *et al.* de qui il avait acheté l'immeuble, et ces derniers plaidèrent à l'action principale qu'ils avaient acquis l'immeuble en question d'un nommé Jean-Baptiste Leblanc, contre lequel le demandeur n'avait aucune hypothèque.

L'intimé répondit à cette défense, et les appelants, après avoir produit leur articulation de faits, demandèrent, cour tenante, que l'enquête fut prise par écrit suivant le statut, et que la cause fut rayée du rôle des causes non appelables et placées sur celui des causes sujettes à appel, vu qu'elle était appelable de sa nature. (1)

(1) Autorités citées par les appelants :
Stat. Ref. du B. C., c. 77, sec. 39:—1 Nouv. Dem., vbo. Action, Par. 2, sec. 2:—6 Id. vbo. Déclaration d'Hypothèque:—2 Bourjon, lib. 6, ch. 1, nos. 1 et suiv., tit. 1, p. 428, nos. 9, 10; tit. 6, Hypothèques, p. 642:—Stat. Ref. du B. C., c., 82, sec. 2,—12 Déc. des Trib. B. C., p. 126.

Cette demande fut rejetée instanter, et l'intimé procéda à faire entendre ses témoins *viva voce*, et sans qu'il fût pris notes de leurs témoignages.

Le 8 mars, 1864, jugement fut rendu, condamnant le défendeur à délaisser, et les appelants à indemniser et acquitter le défendeur principal du montant de la condamnation.

C'est de ce jugement qu'était appel.

. De la part des appelants, il fut dit :

1° Qu'aux termes du Stat. Ref. du B. C., cap. 77, sec. 39, la cause soumise était de sa nature appellable.

2° Qu'une action hypothécaire est une action réelle ; que le tiers détenteur était sujet à éviction ; que son titre pouvait être révoqué en doute, et qu'il pouvait être privé de la propriété même, et que partant, en pareil cas, l'action était appellable. (1)

3° Qu'aucun témoignage verbal ne pouvait être légalement produit contre le certificat de l'enregistreur, lequel, dans l'espèce, constatait : " qu'il n'appert pas qu'il y ait eu " avant ou après le 27 janvier, 1859, aucun jugement enregistré dans ce bureau, dans une cause où Thomas Grange " est le demandeur et Jean-Baptiste Leblanc défendeur."

De la part de l'intimé, il fut prétendu :

1° Qu'il n'y avait aucun appel du jugement en question en la cause.

Le Stat. Ref. du B. C., cap. 83, secs. 95 et 182, ordonnait que dans les causes appellables, dans la Cour de Circuit, les témoignages seraient rédigés par écrit de même que dans

(1) 1 Nouv. Den., vbo. Action, par. 2, sec. 2 :—6 Id. vbo. Déclaration d'hypothèque. Ces actions conviennent entr'elles par leur nature. Toutes les deux sont réelles parce qu'elles naissent également du droit qu'a le créancier sur la chose hypothéquée :—2 Bourjon, lib. 6, chap. 1, Nos. 1 et suivants :—Titre 1, p. 428, Nos. 9 et 10 :—Titre 6, des Hypothèques, p. 542 :—12 Dec. B. C., p. 125, Chaumont et Grenier.

la Cour Supérieure, mais, par la 25 Vic., cap. 10, sec. 11, il était ordonné que les témoignages dans les causes appelables, Cour de Circuit, seraient pris de la même manière que dans les causes non-appelables, à moins que l'une des parties ne demanda que les témoignages ne fussent rédigés par écrit. Dans la cause, la motion pour faire rédiger les témoignages par écrit avait été faite le 7 juin, le jugement dont était appel était du 8 du même mois.

2° Que la cause ne tombait pas sous les dispositions du Stat. Ref., cap. 77, sec. 39.

3° Que la cause eut dû être évoquée avant d'avoir été portée en appel. (1)

4° Qu'à tout événement, la Cour ne pouvait que renvoyer le record devant la Cour de Circuit en ordonnant que la preuve y serait rédigée par écrit.

DUVAL, Chief Justice:—Stated in effect that the question in the case involved only a small amount, but raised a question of some importance which had been much discussed by authors, whether an action *en déclaration d'hypothèque*, was or was not a real action. The Court below refused defendant's motion to put the case for *enquête* on the appealable roll, and the evidence was taken orally. The majority of this Court held the action to be in its nature real and therefore appealable. Judge Meredith and himself dissented, on the ground that the *hypothèque* was merely an accessory to the principal debt and must follow it. Marcadé said, that if an *hypothèque* was held to be a *jus in re*, the debt must, in a succession, go to the *héritier mobilier*, and the *hypothèque* to the *héritier immobilier*. It was true, Pothier said, a *hypothèque* was a *jus in re*. The phrase must have escaped him, for in his latter works on community he called it otherwise.

AYLWIN, Justice:—The principle upon which I hold

(1) Stat. Ref. du B. C., cap. 83, sec. 173.

this to be a real action and appealable, is that a *délaissement* may follow.

DRUMMOND, Justice :—I think the *action* is clearly a real action.

MONDELET, Juge :—L'intimé ayant en Cour de Circuit, (comté de Soulanges) porté contre les appelants une action en déclaration d'hypothèque pour \$77, il s'est élevé la question de savoir si l'action devait être instruite comme une cause appelable ou non.

Le 7 mars, 1864, les appelants ont produit des articulations de faits, du consentement de l'intimé, et ont demandé, Cour tenante, que l'enquête fût prise par écrit, suivant le statut, et ont aussi demandé que cette cause fut rayée du rôle des causes non-appelables et placée sur celui des causes sujettes à appel, vu qu'elle est appelable de sa nature.

La Cour rejeta de suite cette motion et le demandeur procéda à la preuve orale.

La principale raison que l'on oppose à la prétention des défendeurs, est qu'ils auraient dû évoquer.

Cette distinction me paraît insoutenable. L'action hypothécaire est une action réelle, elle naît du droit qu'a le créancier sur la chose hypothéquée. Je pense donc, que le jugement de la Cour de première instance est mal fondé.

Cette Cour doit l'infirmer et renvoyer le dossier à la Cour de première instance, pour y être procédé comme dans une cause appelable.

Il va sans dire que l'intimé doit être condamné à tous les dépens.

Jugement.—Considérant que l'intimé, demandeur en Cour de première instance, s'est pourvu contre les appelants par une action en déclaration d'hypothèque :

Considérant que cette action en est une d'une nature réelle :

Considérant que les dits appelants étaient en droit de demander et d'obtenir de la Cour, qu'il fut procédé à prendre l'enquête par écrit, et de faire rayer la dite cause du rôle des causes non appelables sur lequel la dite cause avait été inscrite, attendu qu'elle est appellable de sa nature :

Considérant que les appelants ont régulièrement fait cette demande à la Cour de première instance, et que de suite la dite Cour l'a refusée :

Considérant qu'à cette égard, et en ce refusant, la Cour de première instance a erré :

Considérant que cette erreur de la part de la Cour de première instance, suivie d'un jugement au mérite doit avoir l'effet, et a l'effet, d'entacher d'erreur le jugement final rendu par la dite Cour de première instance le 8 juin, 1865.

Cette Cour casse et met de côté les dits jugements de la Cour de première instance, etc., et procédant à rendre le jugement qu'aurait dû rendre la dite Cour de première instance, annule et met de côté comme nuls et non venus tous les procédés en la dite Cour, depuis et compris le dit jugement du 7 juin, accorde la demande des appelants et ordonne que la cause susdite soit rayée du rôle des causes non appelables et mise sur celui des causes appelables, pour être procédé suivant qu'il appartiendra, et cette Cour condamne l'intimé à tous les dépens tant en cette Cour qu'en la Cour de première instance.

MOREAU, OUMET & CHAPLEAU, for appellants.

DOUTRE & DOUTRE, for respondent.

SUPERIOR COURT.—MONTREAL.

IN REVIEW.

Before:—BADGLEY, BERTHELOT and MONK, Justices.

No. 611. { LASELL.....*Plaintiff.*
 { vs.
 { BROWN.....*Defendant.*

Held:—That where a defendant moved before *enquête* to amend his plea on payment of costs, on affidavit to the effect that from absence from the country, and from sickness, he had been unable to give proper instructions to his attorneys, and afterwards made a similar motion at the hearing on the merits, both of which motions were rejected, the Court of Review will reverse the final judgment rendered and allow the defendant to plead *de novo*, on payment of all costs, considering that sufficient cause had been shown to authorize the amendment.

Jugé:—Que lorsqu'un défendeur a fait motion avant l'enquête pour amender son plaidoyer sur paiement des frais, s'appuyant sur un affidavit déclarant que par suite de son absence du pays, et par maladie, il lui avait été impossible de donner les instructions nécessaires à ses procureurs, et lorsque ce défendeur a depuis fait une motion semblable, lors de l'audition aux mérites, ces deux motions ayant été rejetées, la Cour de Révision renversera le jugement final rendu, et permettra au défendeur de plaider *de novo* sur paiement de tous frais, considérant que le défendeur avait donné des motifs suffisants pour autoriser l'amendement.

Judgment rendered the 30th December, 1865.

BADGLEY, Justice.—This case comes up from the Superior Court, district of St. Francis. The action was brought for \$1128, a balance alleged to be due on a settlement of accounts arising out of dealings in lumber between the parties. The plea admitted the settlement of accounts, but alleged that the balance so settled had been reduced by payments. After plea filed the defendant moved to be permitted to amend his plea by setting up further payments reducing the balance due; and especially setting up that certain payments had been made to the British American Land Company, for what was called *stumpage*, and which it was alleged were to be deducted from the amount due by the settlement, if paid by the defendant. The motion was made subject to proceeding *instantier* and on payment of costs.

The motion was based upon an affidavit of the defendant, that he was absent in the United States at the time the action was commenced, and had been unable from

illness, since his return, to give proper instructions to his attorneys for his defence. This motion was rejected and the case went to *enquête*. At the hearing on the merits the defendant again moved to amend his pleas "by inserting therein that defendant had paid the amounts proved by the *faits et articles* submitted to the plaintiff "and answered by him." This motion was also rejected, and judgment was rendered for \$964.80.

The Court hold the defendant was entitled to amend his pleas, on payment of costs, and that the Court at Sherbrooke erred in not allowing the amendment on payment of costs, and that the judgment must be reversed.

RITCHIE & BORLASE, for plaintiff.

FELTON & FELTON, for defendant.

SUPERIOR COURT.—MONTREAL.

Before :—BADGLEY, BERTHELOT and MONK, Justices.
IN REVIEW.

No. 1178. { TESSIER.....Plaintiff.
vs.
{ BIENJONETTI, *et al*.....Defendants.

Held :—That a person openly and peaceably in possession of a lot of land, seized and sold by the sheriff for a debt due by his auteur, can bring a direct action against the plaintiff who became the *adjudicataire*, and against the defendant and sheriff, to be declared the proprietor, and have the adjudication set aside as null and void as having been made *super non domino*, and this without filing any opposition, or taking any other proceedings in the cause wherein the adjudication was made.

Jugé :—Qu'une personne publiquement et paisiblement en possession d'un lot de terre, saisi et vendu par le shérif pour une dette due par son auteur, peut porter une action directement contre le demandeur qui est devenu l'*adjudicataire*, et contre le défendeur et le shérif, pour être déclaré propriétaire, et faire mettre l'*adjudication* de côté comme nulle et non avenue comme ayant été faite *super non domino*, et ce sans la production d'aucune opposition, ou sans avoir adopté aucune autre procédure dans la cause où l'*adjudication* avait été faite.

Judgment rendered the 30th September, 1865.

The action was brought against Bienjonetti, the *adjudicataire* of a lot of land, and against the sheriff of the district

of Montreal, and one Jean Bte. Légault, defendant in the suit in which the land had been sold, to set aside the adjudication of the property, and any deed given by the sheriff in virtue thereof, and to have the plaintiff declared proprietor of the land.

The plaintiff set up, in his declaration, a deed to him of the land in question by *donation onéreuse* of the 29th January, 1861, by which the plaintiff agreed to support the donor and his sister, also to pay hypothecary claims on the lot to the extent of \$318, and alleged also that he, the donee, had a *hypothèque* upon the land for £62.10.1, under obligation in his favour; that the donor Legault had not been in possession of the lot since the date of the donation, but on the contrary he, the plaintiff, had possessed and cultivated it openly, and was in possession at the time it was seized on the 15th October, 1868, under a judgment obtained by Bienjonetti against the said Jean Baptiste Légault, for \$18.14.6.

That the sale to Bienjonetti of the 1st of May, 1864, was null as being made *super non domino et non possidente*.

Bienjonetti alone pleaded to the action, to the effect that the land mentioned in the donation was the only property the defendant Legault possessed, that he had become insolvent, that the debt due the plaintiff was thus endangered, and moreover that the donee, the now plaintiff, was well aware that the lot had been seized, and should have filed an opposition to the sale, but had failed to do so, although he had been present at the sheriff's sale and bid upon the property. Conclusion that the donation be declared fraudulent, and for dismissal of the plaintiff's action.

BERTHELOT, Justice :—Held that the sale of the land made in the suit of Bienjonetti against Legault was invalid as being *super non domino*. The now plaintiff being in possession might have filed an opposition, but being in open, peaceable possession, as was admitted by Bienjonetti,

the defendant, pleading to the action, the plaintiff was not deprived of his rights by the adjudication, and was entitled to bring the action.

Judgment:—" Considérant qu'il est en preuve que le demandeur est devenu acquéreur de l'immeuble désigné..... en vertu de l'acte de donation, en date du 29me jour de janvier, 1861, et qu'il en a pris possession lors de sa passation, et qu'il en était propriétaire en possession tant le 15 octobre, 1863, lors de la saisie de l'immeuble, que le 1er mars, 1864, jour de l'adjudication qui en a été faite par Tancrede Bouthillier..... considérant qu'à raison de ce que dessus, la vente par décret du 1er mars, 1864, est nulle, et de nul effet, vis-à-vis du dit demandeur, comme ayant été faite *super non domino*. La Cour adjuge et déclare le dit demandeur seul, vrai, et légitime propriétaire du dit immeuble, et le maintient en la possession d'icelui, qu'il n'a pas perdue, nonobstant le dit décret; déclare nulle, illégale et de nul effet, la dite vente et adjudication..... ainsi que tout acte ou titre que le dit shérif pourrait avoir donné, et tous les procédés pour parvenir à la dite adjudication, avec frais contre le défendeur, François Bienjonetti, et ordonne que le présent jugement soit signifié aux dits défendeurs, Tancrede Bouthillier, écuyer, et Jean Baptiste Legault." (1)

BADGLEY, Justice:—Stated pleadings. The donation to the present plaintiff conveyed property, it was followed by possession, and the proceedings by Bienjonetti to bring the property to sale were void. True, an opposition might have been filed, but it appeared to have been left till it was too late, and a judge's order could not be obtained.

(1) In review authorities cited for Bienjonetti:—As to *deconfiture*, and right of creditors on property of debtor, 2 L. C., Jurist, p. 185:—5 Id. p. 1:—Party in possession should file opposition, Con. Stat. L. C., chap. 88, sect. 15:—Cont. de Paris, art. 354:—5 Guyot, Rep., vbo. Décret, p. 308:—2 Anc. Denisart, vbo. Décret, p. 22, No. 85:—2 Bourjon, p. 714, arts. 101, 108:—6 L. C. Rep., p. 404:—Acquiescement, 1 An. Denisart, vbo. Acquiescement:—1 Ferrière, Dict., vbo. Acquiescement:—1 Nouv. Denisart, p. 148, Nos. 2 et 3, vbo. Acquiescement:—Authorities for plaintiff, 1 Pigeau, p. 779:—Hericourt, p. 45:—6 Guyot, Rep., vbo. Décret, p. 307:—Bousseau de la Combe, vbo. Décret, No. 2, p. 158:—3 Rev. de Legis., p. 476:—Nouv. Denisart, vbo. Fraude, sect. 2, No. 9:—6 L. C., Rep., p. 489.

But the remedy by action still remained, and the judgment brought up for review must be sustained. If the donation to the now plaintiff were seriously alleged to be fraudulent an action should have been taken to set it aside, although he did not see in what respect Bienjonetti could derive any advantage from such an action, his judgment being on a chirographary debt, and the land mortgaged beyond the value proved in the case.

Judgment 30th September, 1865, confirming the judgment brought up for review, with costs.

BONDY & FAUTEUX, for plaintiff.

MOREAU, OUMET & CHAPLEAU, for defendant Bienjonetti.

CIRCUIT COURT, MONTREAL.

Before :—BERTHELOT, Justice.

No. 2894.	{	BOUTHILLIER..... <i>Plaintiff.</i>
		vs.
		BERTHELET..... <i>Defendant.</i>
		and
		BOUTHILLIER..... <i>Plff. en garantie.</i>
		vs.
		RYLAND..... <i>Deflt. en garantie.</i>

In an action by the sheriff of the district of Montreal, to recover \$8.30, paid to the registrar of the County of Montreal, for registration of a sheriff's deed, and entering discharge of anterior mortgages.

Held :—1o. That the only sum legally payable was \$3.10, as per statement filed with the defendant's plea.

2o. That the sheriff was not justified in bringing in the registrar by action *en garantie*.

Dans une action par le shérif du district de Montréal pour le recouvrement de \$8.30, payées au registrateur du comté de Montréal pour l'enregistrement d'un titre du shérif, et pour radiation des hypothèques antérieures.

Jugé :—1o. Que le seul montant légalement dû, était \$3.10, ainsi qu'il apparaissait par un état produit avec les défenses du défendeur.

2o. Que le shérif n'avait pas droit de porter une action *en garantie* contre le registrateur.

Judgment rendered the 30th December, 1865.

The action was brought by the sheriff of the district of Montreal, to recover \$8.30, paid by him, to the registrar of the County of Montreal, namely, \$3 for enregistering a

sheriff's deed of sale of a land purchased by the defendant, and \$5.90 for discharges entered against the land sold.

The defendant pleaded that the only sum which was legally due to the registrar, was \$3.10, as per statement filed with his plea, viz:—

For registration of deed, 725 words, 50 cents for 400 words, and 10 cents for each additional hun- dred words, in all.....	\$0.90
Court House Tax.....	\$0.90
For Registrar's certificate on deed.....	\$0.50
For entering discharge of Hypothèques, 40 cents, if not more than 6 <i>Hypothèques</i> , and 80 cents for whatever be the number of <i>Hypothèques</i> , includ- ing all searches.....	\$0.80
	<hr/> \$3.10

The sheriff called in the registrar as defendant *en garantie*, who pleaded to the action *en garantie*, that he was not the *garant* of the sheriff; that the payment of the \$8.30 if made was so made for fees of office and voluntarily, and could not be recovered back by the action as brought; that he was ready to justify his right to the fees paid, and that even if the payment was in excess of the fees legally due, the payment so made by the sheriff could not form the basis of a demande *en garantie*. (1)

BERTHELOT, Justice:—Stated the pleadings and held the defendant's pleas justified by law, and the Tariff of fees in force. The sheriff's action *en garantie* could not be maintained; he was not justified in demanding more than the sum of \$3.10, which the defendant was ready to pay,

(1) In support of the plea of the principal defendant the following citations were made:

Con. Stat. L. C., chap. 37, sec. 195:—Honey's Tariff of fees, pp. 147, 148. Table of fees, under the order of the Governor in Council of the 7th March, 1862, Nos. 11 and 14:—Court House Tax, 50 cents for 400 words and 10 cents for each additional 100 words. Honey's Tariff, p. 117, 25 Vic. chap. 11, sec. 2, obliging the sheriff to register all sheriffs' deeds, and providing for the radiation of anterior *Hypothèques*.

for which judgment would be rendered. Judgment for \$3.10, without costs to plaintiff, and with costs of contestation against him. *Action en garantie* dismissed.

CARTIER & POMINVILLE, for plaintiff.

LIESAGE, for defendant.

McKAY & AUSTIN, for Ryland.

QUEEN'S BENCH, } DISTRICT OF MONTREAL.
APPEAL SIDE.

Before :—AYLWIN, MEREDITH, DRUMMOND and MONDELET, Justices.

McPHEE.....Appellant.

and

WOODBIDGE.....Respondent.

In an action by a curator to the vacant estate of a testator, against the representatives of one of three joint executors for a specific amount of interest received by such executor :

Held :—In the Superior Court :—That when the testator by his will bequeathed to his brothers and sisters by name, the residue of his estate as universal residuary legatees, and the plea alleged accountability of the executors to such universal legatees, and not to the curator, and that the curator was irregularly named; the *onus* of proving that the universal legacy became *caduc* fell upon the plaintiff, and there being no such proof, the appointment of curator was a nullity.

In Appeal, without any expression of opinion on the point decided in the Court below, that the action was properly dismissed, on the ground that if the legal representatives of the testator had any claim, it must be urged against all three executors or their representatives for the gestion of the estate generally, and not for a specific sum of money.

Dans une action par un curateur à la succession vacante d'un testateur, contre les représentants de l'un de trois exécuteurs conjoints pour le montant de certains intérêts reçus par tel exécuteur :

Jugé :—Dans la Cour Supérieure :—Que lorsque le testateur par son testament a légué à ses frères et sœurs nommément, le résidu de sa succession comme légataires universels résiduels, et le plaider alléguait comptabilité des exécuteurs à tels légataires universels, et non au curateur, et que le curateur avait été irrégulièrement nommé; que l'*onus probandi* que le legs universel était devenu *caduc* incombait au demandeur, et que n'y ayant aucune telle preuve, la nomination de curateur était nulle.

En d'Appel, sans exprimer aucune opinion quant à la question décidée en Cour inférieure, que l'action devait être renvoyée par la raison que si les représentants légaux du testateur avaient aucune réclamation, lesile devait être exercée contre les trois exécuteurs ou leurs représentants en raison de leur administration de la succession généralement, et non pour un montant donné.

Judgment rendered the 9th December, 1866.

The action was instituted by the plaintiff as curator to the vacant estate of the late Duncan Campbell, against the

respondent, described as the widow of the late Doctor Alexander, in his life time of the village of Laprairie.

The declaration set up a notarial sale by Lawrence Kidd, A. T. Alexander and Thomas Smart, as joint executors of the will of the late Duncan Campbell, to John and David Torrance, of a lot of land in the village of Laprairie, for a price mentioned; that Smart did not act as executor after signing the deed, but died within a few years after; that Lawrence Kidd, another executor, died in 1843, and that the interest accruing on the balance due under the deed of sale, came into the hands of Dr. Alexander as executor, and that the respondent, under the will of Doctor Alexander, her late husband, and as his universal legatee, was liable for interest received, and for additional profit received by using the moneys.

The pleas of the defendant set up, in effect, that the plaintiff's appointment as curator was irregular and void, and was made on petition, and by the advice of persons having no interest in the estate; that the estate of the testator was not vacant; that the name of the plaintiff had been used by parties desirous of fraudulently intermeddling with the estate, and as if the estate had been vacant; that, under the will of Duncan Campbell, he had named universal legatees, to whom or to whose legal representatives alone the executors were liable to account for all their acts as executors when thereto required; and that the action should have been brought for an account generally of the executors *gestion*, and been directed against all the executors, if, as such curator, the plaintiff had a right to bring such action.

The evidence for the plaintiff consisted of the proofs of the receipts for instalments of interest.

Judgment in Superior Court, Montreal:—LORANGER, Justice:—“ Considérant que par son testament solennel, reçu le nommé Duncan Campbell, à la succession vacante

du quel le demandeur, John Rankin, a intenté la présente demande comme curateur, a institué des légataires universels et particuliers auxquels feu Asa T. Alexander, que représente la défenderesse, était comptable comme un des exécuteurs du dit Testament : Considérant qu'il n'existe pas au dossier de preuve de la caducité de ces legs, et que la succession du dit Duncan Campbell soit devenue vacante, et qu'en l'absence de cette preuve la nomination du demandeur principal comme curateur à la dite succession, et celle du demandeur par reprise d'instance, au lieu et place du demandeur principal, doivent être traités comme des nullités.

“ Faisant droit sur les defenses de la défenderesse, lui en adjuge le bénéfice, en les maintenant, et partant, a débouté et déboute la présente demande, et condamne personnellement le demandeur principal, et le demandeur par reprise d'instance, à payer à la dite défenderesse les frais par elle encourus sur la présente action.”

CROSS, Q. C., for appellant :—The *onus* of proof lay upon the defendant, not upon the plaintiff.

The plaintiff, as a duly appointed administrator, had at least a *prima facie* and presumptive right and possession, until divested in due course of law.

The demand was for the interest of a sum of money, the capital whereof it was admitted, and was proved, to have passed into the hands of the plaintiff as administrator. It was not competent for the defendant, a mere debtor to the estate, and without any title to administrative capacity, and without any interest in such a defence, to set up the pretension that another had a right to the moneys.

It was competent for the plaintiff as administrator in possession, to give the defendant a sufficient discharge, which was all that interested her.

She had no interest whatever in determining who was a

rightful representative, but only who was *de facto* representative.

The curator must be presumed to have produced the proof necessary to warrant his appointment at the time it took place, and becoming vested by authority of Justice, remains so until divested by some one having a better title.

In respect of the pretension raised that the action should have been for an account generally, it may be said in the first place, there is no such rule of law whatever, to exclude a specific demand, even where there is a right to an action of account. Again, the greater recourse always includes the lesser. Lastly, that it is in fact and in name an action to account, but there being but one item or sum of money in question, the conclusions claim only a simple condemnation for a specific sum, and is the most apt and proper recourse suited to the circumstances. When a single object is sought, of right belonging to the plaintiff, should there be further liability, the defendant cannot complain of its omission.

ROBERTSON, Q. C., for respondent:—1° The estate of the testator was not vacant, and therefore, the appointment of a curator, even if regularly made, on petition of creditors or parties interested, was a nullity.

The testator by his will, after specific legacies to persons named, directed that the rest and remainder of all and singular his, the testator's property and effects, both personal and real, should be paid, distributed and divided:

An equal fifth part unto John Campbell and his lawful children; one other fifth part to his late sister Janet's lawful issue; one other fifth part to his sister Margaret, &c., constituting them, his said brothers and sisters (named) his residuary devisees and legatees.

By this clause the succession, under the Imperial Act 14,

Geo. 3, and the Provincial Statute 41, Geo. 3, c. 4, devolved upon these legatees, without the necessity of any demand *en délivrance*.

One of the *considéranis* of the judgment in appeal in the case of Blanchet and Blanchet, 11 L. C. Rep., p. 204, expressly held that under these statutes, "le légataire universel devient saisi de l'hérédité en vertu et par force du testament," and in the recent case of Webb vs. Hall, 15 L. C. Rep., p. 172, the same doctrine was maintained.

If the law throws the succession on the universal legatees, under the will, their rights cannot be interfered with by an *ex parte* appointment of a curator to the succession, as vacant. Nor are the executors bound to account to a curator, without any allegation or evidence that the universal legatees have renounced the succession, or that the legacy had lapsed.

The title under which the executors were named, the will itself, shews the estate not to be vacant; the will recognizes the brothers and sisters of the testator and their heirs as his universal legatees. Such a state of things shews the succession was not vacant.

At the words "Biens Vacans," Denisart, p. 504, says: "Dans un sens très-étendu on nomme biens vacans tous ceux qui n'ont plus de maître." p. 514, "Lorsqu'un défunt ne laisse point des successeurs universels appelés par la loi, ou par la disposition de l'homme, ou que ceux qui le sont renoncent, la succession est vacante."

The succession of the testator Campbell, in this case, vested under the will in his brothers and sisters, as his universal residuary legatees, and the executors were therefore liable to account to them, and to them alone. (1)

(1) 8 Nouv. Denis., vbo. Exécuteur, p. 231, No. 4.

2. The executors should have been sued together and for an account of the succession generally, and not as in this case, the representative of one executor only. In *Dame vs. Grey*, (1) it was held: "That all joint executors who have acted, must in an action of account be made parties to the suit, and be jointly summoned as such." It appears from the declaration that all the three executors acted in the deed of sale to Messrs. Torrance, and the authority quoted is therefore applicable in this case.

"Quand il y a plusieurs personnes chargées conjointement, elles doivent rendre leur compte conjointement, et elles sont tenues solidairement pour le *reliquat*." (2)

Here the action is not for an account, but for a specific sum alleged to have been received by one executor for interest, and the respondent is deprived of an opportunity of rendering a full account, and of obtaining any balance due in case the disbursements exceeded the receipts, and there was no *reliquat*. (3)

3. The defendant expressly put in issue the validity of the appointment of the curator, from the want of interest in Rankin, to have a curator named, and it is submitted that a nomination by persons picked up in the Court House, cannot be held as a valid appointment, to enable him to bring an action against the representative of one of the executors only.

DRUMMOND, Justice:—After stating the pleadings and adverting to the judgment in the Court below, said that the Court had come to the same conclusion as the Judge in the Court below, but on an other ground. The Court held that the action should have been against all the executors, and for an account generally.

(1) 1 *Revue de Jurisp.*, p. 351, No. 239 of 1812, *Dame vs. Grey*.

(2) 8 *Nouv. Denisart*, p. 234, No. 10.

(3) *Ib.*, p. 235, No. 12.

MONDELET, Justice :—The Court is unanimous in maintaining the judgment. As to the regularity or irregularity of the *curatelle* it is unnecessary to give any opinion.

Judgment in appeal :—“ Considering that the legal representatives of the late Duncan Campbell, whoever they may be, had no right of action to claim a special sum of money from the respondent as received by her late husband, Asa J. Alexander, in his capacity of one of the three joint executors of the last will of the said Duncan Campbell, and could only urge their claims, if any they have, by means of an action against all the executors, or their representatives, respectively, for the gestion of the estate by such executors, and therefore that there is no error in the judgment appealed from, this Court doth affirm the same, &c.

CROSS & LUNN, for appellant.

ROBERTSON, A. & W., for respondent.

BANC DE LA REINE, { DISTRICT DE MONTRÉAL.
EN APPEL.

Présents :—DUVAL, Juge-en-Chef, AYLWIN, MEREDITH,
DRUMMOND et MONDELET, Juges.

LEGAULT..... *Appelante.*

et

LEGAULT..... *Intimé.*

Jugé :—Que la faculté de plaider *in forma pauperis* ne peut être accordée-en | Held :—That the privilege of proceeding *in forma pauperis* cannot be granted in the Court of Appeals.

Jugement rendu le 3 mars, 1866.

L'appelante en la cause, qui, en Cour de première instance, poursuivait une demande en séparation de corps et de biens d'avec son mari, avec saisie gagerie et arrêt avant jugement, ayant succombée dans sa demande, s'adressa par requête à l'hon. Juge Mondelet, exposant les faits de la cause, et l'impossibilité pour elle de subvenir aux frais de

l'appel, n'ayant sous aucune forme quelconque la valeur de cinq louis sterling, et demandant d'être autorisée à procéder sur appel *in formâ pauperis*. La requête était appuyée d'un affidavit quant à la vérité des faits qui y étaient énoncés.

L'honorable Juge Mondelet accorda les conclusions de la requête le 18 mai, 1865.

Le 3 juin suivant, l'intimé fit motion que l'ordre donné par son honneur le Juge Mondelet fut revisé et que cet ordre fut rescindé, " attendu que la dite appelante ne peut
• " être recevable en loi à poursuivre un appel *in formâ pauperis*, le record établissant en outre qu'elle possède des " valeurs pour plus de cinq louis courant, le tout avec " dépens."

La dernière allégation de cette motion était fondée sur la réception par l'appelante d'un billet en brevet par devant notaire que lui avait donné un nommé F. X. Legault, comme partie du prix d'une terre, tandis que l'appelante, dans sa requête, se plaignait, entre autres choses, de ce que l'intimé par violence et sévices l'avait forcée de lui remettre ce billet.

Les parties furent entendues sur la motion.

MONDELET, Juge, *dissentiente*:—Croit que le droit de permettre de poursuivre *in formâ pauperis* est inhérent à tout tribunal, et qu'il n'est pas nécessaire qu'un statut formel l'attribue à la Cour d'Appel. Il considère que ce serait un déni de justice parcequ'une partie est pauvre de lui refuser le droit d'appeler sans être obligée de payer les officiers de justice, tandis qu'elle pourrait obtenir la révision du jugement dont elle se plaint, si elle avait seulement les quelques piastres nécessaires pour payer ces officiers. Il maintiendrait en conséquence l'ordre donné en faveur de l'appelante.

AYLWIN, Justice:—If the application were now to be

allowed there would be no want of appeals *in formâ pauperis*. There has never been any order of the kind made in this Court for forty years to my certain knowledge, and I do not believe that any precedent can be found in any record in appeal since the conquest. There, indeed, was an attempt made to proceed *in formâ pauperis* in this Court, at Quebec, shortly after I came to the bar, but it was at once scouted. In the applications of this description in original jurisdiction, the suitor presents his petition, verifying upon oath such facts as shew that he has a right of action, and upon a certificate of counsel to the effect that the applicant has a good cause of action, the order is made. In granting the order the judge does not express any opinion upon the matter in contestation, it is only with the view of bringing a claim to be investigated. The matter would be very different in appeal. In the first place it would be necessary that so much of the record as is required should be shewn to the judge, and that the counsel should swear to the fact that the abstract of the case is correct, as a foundation of the application. This would be the certificate of a good cause of appeal, and upon that would the order of the judge in appeal authorizing the proceeding *in formâ pauperis* be made, such an order would import an opinion expressed upon the appeal before the hearing of the other party who would have a right of course to urge that the judgment was right.

In the one case, if the two parties were to be heard, there would be a preliminary judgment before trial, in the other case there would be a judgment without hearing, and upon an *ex parte* statement the judgment of the Court below would be presumed to be incorrect, whereas such judgment would be in point of law *res judicata pro verâ habeatur*. The duties of a judge in appeal would be very much increased if the application were to be allowed, and it would result that it would be a proceeding not unlike to the french system *en conciliation* before *la poursuite*.

dette particulière du dit Camille Lacombe, et considérant enfin qu'il y a erreur, etc., infirme le jugement.....et maintient la dite requête du dit requérant, et ordonne que la dite demande n'aura plus ni force, ni effet. Le tout sans frais.

LAURIER, for petitioner.

CARTIER and POMINVILLE, for claimants.

SUPERIOR COURT.—MONTREAL.

IN REVIEW.

Before:—SMITH, BADGLEY and MONK, Justices.

No. 129.	{	ELLIS.....	Plaintiff.
		VS.	
		GOULD.....	Defendant.

Held:—That where a party inscribes a cause for review and fails to file the *factum* or statement in review, as required by the rules of practice, and to shew cause why the inscription should not be set aside, such inscription will be discharged and the case remitted to the Court below.

Jugé:—Que dans le cas où une partie inscrit pour révision et fait défaut de produire son *factum* en révision, suivant l'exigence des règles de pratique, et de montrer cause pourquoi l'inscription ne serait pas mise de côté, telle inscription sera rayée et la cause remise au tribunal de première instance.

Judgment rendered the 23rd December, 1865.

Judgment in Review:—"The Court now here sitting as a Court of review, having heard the plaintiff by his counsel upon his motion of this day, that the inscription of this cause upon the roll of the said Superior Court, for review of a certain judgment rendered in this cause on the 23rd day of September last past, in the Circuit Court, in and for the County of Shefford, be discharged, the defendant being called and not appearing to reply to said motion, having examined the record and it appearing that the said defendant hath failed to file in this cause a *factum*, as required by the rules of this Court, doth grant the said motion, and doth discharge the inscription of this cause upon the said roll, and doth order that the record be

remitted to the clerk of the Circuit Court for the County of Shefford, the whole with costs against the said defendant." (1)

PARMALEE, for plaintiff.

FOSTER, for defendant.

COUR SUPÉRIEURE.—QUÉBEC.

Présent:—STUART, Juge.

No. 1224.	{	MAROIS.....	<i>Requérant.</i>
		BILODEAU.....	<i>Défendeur.</i>
		VS.	

Jugé:—Qu'une curatelle ne sera pas mise de côté à la demande d'un beau-frère de l'interdit, qui ne fait apparaître aucun intérêt dans l'affaire, ni qu'il y ait eu fraude pratiquée lors de la nomination du curateur.

Held:—That a *curatelle* will not be set aside at the instance of the brother-in-law of the interdicted party, who shews no interest in the matter, or that any fraud was practised at the time of the appointment of the curator.

Jugement rendu le 3 juin, 1862.

Le requérant par sa requête alléguait qu'il était le beau-frère d'Alexis Taillon, qui avait été interdit le 23 juillet, 1849, à l'instance d'Edouard Boutin, et que Xavier Bilodeau avait été nommé curateur du dit Taillon, sans la participation des parents du requérant, non plus que des parents paternels et maternels du dit interdit; et que partant la curatelle devait être déclarée nulle. Le défendeur plaida qu'il n'y avait pas eu de fraude pratiquée lors de la nomination du curateur, que les parents avaient été appelés à la nomination et qu'ils avaient refusé d'y assister; que le requérant était pauvre et ne pouvait donner aucune garantie suffisante pour la charge de la curatelle; que le dit interdit était depuis neuf ans détenu en l'asile des aliénés, et qu'il était débiteur d'une forte créance en faveur du

(1) Extract from rules of practice as to cases in review.

4. The said original and duplicate shall be produced and filed of record in each case on the day on which the case shall be appointed to be heard, and no hearing shall be allowed or had until the said statement, original and duplicate, shall be so filed. Rules 31st Oct., 1864.

défendeur pour l'obtention de l'acte d'interdiction ; que le dit Marois n'avait aucun intérêt à demander la nullité de la curatelle et la destitution du défendeur.

La preuve établit en substance les faits allégués dans le plaidoyer.

TALBOT, pour le défendeur cita, à l'appui des prétentions émises dans sa défense, 8 Pothier, p. 200, No. 151 :— Meslé, des Minorités, p. 355 :—9 Guyot, vbo. Interdit, p. 450 :—5 Déc. des Tribunaux du B. C., p. 344 :—6 Déc. des Tribunaux du B. C., p. 180.

La Cour renvoie le requérant de sa demande avec dépens.

PLAMONDON & GUILBAULT, pour le requérant.

TALBOT, pour le défendeur.

BANC DE LA REINE, { DISTRICT DE MONTREAL.
EN APPEL.

Présents :—DUVAL, Juge-en-Chef, AYLWIN, MEREDITH,
DRUMMOND et MONDELET, Juges.

GROULX.....*Appelant.*
et

LA CORPORATION DE LA PAROISSE ST. LAURENT....*Intimée.*

<p>Jugé :—Qu'il n'y a pas appel des jugements rendus par la Cour de Circuit en vertu des dispositions du Stat. Ref. B. C., chap. 24, sec. 67, concernant les municipalités et les chemins dans le Bas-Canada.</p>	<p>Held :—That there is no appeal from judgments rendered by the Circuit Court under the provisions of the Con. Stat. L. C., cap. 24, sec. 67, respecting municipalities and roads in Lower-Canada.</p>
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Jugement rendu le 2 mars, 1866.

L'action avait été portée en la Cour de Circuit, pour le district de Montréal, par l'intimée, contre l'appelant, pour amendes encourues par lui faute de s'être conformé aux dispositions d'un procès-verbal établissant un chemin de montée, homologué en partie par le conseil du comté Jacques-Cartier, l'appelant, en sa qualité d'inspecteur des

chemins et ponts, pour l'arrondissement, ayant négligé et refusé de faire faire les ouvrages ordonnés pendant 97 jours, et ayant encouru à cet égard une amende de cinq piastres par jour au plus, formant \$485, et de deux piastres par jour au moins, formant \$194, que l'intimé néanmoins réduisait à \$120.

L'appelant plaida à cette action la nullité du procès verbal et de l'homologation. Jugement fut rendu contre lui le 25 avril, 1865.

RADGLEY, Juge :

"The Court, &c.—Considering that the plaintiffs have established the material allegations of their declaration, and that the defendant in his said capacity of inspector of roads and bridges for the plaintiffs, did, for the period of time in the said declaration mentioned, refuse and neglect to execute and perform the duties required of him, as such inspector, as alleged in said declaration, and has in consequence become subject to the penalty imposed by law; doth condemn the defendant to pay and satisfy to the plaintiffs for the causes aforesaid, the sum of one hundred and twenty dollars as such penalty aforesaid, to which the plaintiffs' demand hath been reduced, with interest thereon from this date, and costs of suit."

DRUMMOND, Juge :—L'objet du statut des municipalités a été d'écarter tous les obstacles qui pouvaient s'opposer aux travaux nécessaires pour les besoins des municipalités, dont elle leur donnait le contrôle entier, et pour l'exécution de ces travaux et pour en faciliter l'exécution, elle donnait aux petites juridictions locales le droit de prendre connaissance des poursuites nécessaires, en assujettissant les sentences rendues par ces tribunaux à la révision par appel à la Cour de Circuit. C'est le seul cas où il y ait appel. La loi, en permettant de porter également les actions devant la Cour de Circuit directement n'a pas pourvu au moyen d'appeler des jugements qu'elle peut

rendre en première instance, et la section 67 du statut des municipalités qui donne le recours en appel des petites juridictions n'établit pas d'autre tribunal d'appel que la Cour de Circuit, qui ne peut reviser ses propres jugements. Cette Cour ne peut donc prendre connaissance de la cause, et le jugement de la Cour de Circuit est final et en dernier ressort, et la requête en appel présentée à cette Cour doit être renvoyée.

La Cour, &c.—Vu que le jugement dont on a interjeté appel a été rendu par la Cour de Circuit en vertu des dispositions de l'Acte des municipalités du Bas-Canada de 1860, qui enlève à cette Cour toute juridiction à l'égard de tout jugement prononcé par la dite Cour de Circuit, en vertu du dit acte : La Cour accordant la motion de l'intimée renvoie, déboute et met au néant le dit appel, avec dépens contre l'appelant.

MOREAU, OUMET & CHAPLEAU, pour l'appelant.

GIROUARD, pour l'intimée.

SUPERIOR COURT.—MONTREAL.

Before :—BERTHELOT, Justice.

No. 109.	{	PROULX.....	<i>Plaintiff.</i>
		vs.	
		DUPUIS.....	<i>Defendant.</i>

Held :—That where the defendant in an action for tithes pleaded that he was not a member of the roman catholic Church, but was a protestant and had given the curé, plaintiff in the cause, due notice thereof, such notice cannot be proved by parol evidence.

Jugé :—Que lorsque le défendeur dans une action pour dîmes a plaidé qu'il n'appartenait pas à l'église catholique romaine, mais qu'il était protestant, et avait donné avis de ce fait au curé, le demandeur dans la cause, tel avis ne pourra être prouvé par témoignage verbal.

Judgment rendered the 31st October, 1865.

The action was brought in the Circuit Court, Montreal, by the plaintiff, *curé* of the parish of St. Philippe, to recover £12.10, *dîmes* for 1863, and was taken by evocation into the Superior Court. The plea was to the effect that the

defendant was not a member of the roman catholic church, but had become a protestant, and had duly notified the plaintiff to that effect.

At *enquête*, a question was put by the defendant to one of his witnesses, as follows: "Avez-vous été requis en aucun temps par le défendeur de notifier le demandeur qu'il était protestant, et dites ce que vous avez fait à ce sujet?" An objection was made to the question and was maintained by the judge at *enquête*.

On motion to revise the ruling:

BERTHELOT, Justice:—Held, that the ruling at *enquête* was in conformity with law; that a verbal notice was insufficient, and could not be proved by witnesses.

LORANGER & LOBANGER, for plaintiff.

TORRANCE & MORRIS, for defendant.

BANC DE LA REINE, } DISTRICT DE MONTRÉAL.
EN APPEL.

Présents:—DUVAL, Juge-en-Chef, AYLWIN, MEREDITH,
DRUMMOND et MONDELET, Juges.

LA COMPAGNIE DU GRAND TRONC DE CHEMIN
DE FER DU CANADA.....*Appelante.*

et
THE EASTERN TOWNSHIPS' BANK.....*Intimés.*

Jugé:—Que les locomotives d'un chemin de fer sont immeubles par destination, et ne peuvent être saisies et vendues séparément du chemin. (1)

Held:—That the locomotives upon a railroad are immovable *par destination*, and cannot be seized and sold apart from the road.

Jugement rendu le 8 septembre, 1865.

Les intimés ayant obtenu jugement dans la Cour Supérieure, à Montréal, contre la Compagnie du Grand Tronc

(1) Pour le rapport de la cause en Cour de première instance, vide 13 Déc. du B. C., p. 456.

de Chemin de Fer, pour la somme de \$2568.90, obtinrent un bref d'exécution et firent saisir une locomotive appartenant à leur débitrice.

La compagnie se pourvut par opposition afin d'annuler, se fondant sur le statut provincial de la 25 Vict., cap. 56, antérieur à l'action et au jugement rendu par la Cour Supérieure en cette cause, et en vertu duquel, les demandeurs ne pouvaient exiger que leur proportion dans certains revenus de la compagnie. La compagnie soutenait de plus que la locomotive saisie faisait partie du matériel nécessaire à l'exploitation du chemin de fer, et que ni l'un ni l'autre ne pouvaient être saisis et vendus sur exécution, étant le gage des porteurs des premières et secondes obligations préférentielles de la compagnie et de la province, au montant de trois millions de louis sterling.

Les demandeurs répondirent que l'acte de la 25 Vict., ne pouvait avoir d'effet, vu que la majorité des créanciers n'y avait pas donné son assentiment; qu'il ne pouvait priver les demandeurs de leur recours en vertu du jugement qu'ils avaient obtenu, et que la compagnie ne pouvait exciper du droit d'autrui ainsi qu'elle le faisait par son opposition.

Le 29 septembre, 1863, le jugement suivant fut rendu :

Present:—The Honorable Mr. Justice SMITH.—The Court, &c., considering that the said opposants have altogether failed to shew any right in law, or to establish the existence of any facts, by reason of which or by law, the said opposition can be maintained, or the conclusions of the said opposition granted, doth dismiss the same with costs. C'est de ce jugement qu'était appel.

DRUMMOND, Juge:—Par le jugement dont est appel une opposition afin d'annuler a été déboutée avec dépens. L'acte sur lequel elle était basée est intitulé: " l'Acte des ar-

"rangements, etc." donne-t-il à la compagnie immunité d'exécution ? Telle est la question qui a le plus occupé la Cour.

Il y a quelque différence d'opinion parmi les membres du tribunal quant à la preuve qui n'est pas aussi satisfaisante qu'on aurait pu s'y attendre de la part d'hommes de profession. Néanmoins, en faisant l'application des principes généraux qui doivent guider en semblable matière, et avec un peu d'expérience, il est aisé de dissiper les doutes qui peuvent surgir de la preuve faite.

Le matériel (*fixtures*) d'un chemin de fer doit être considéré comme immeuble par destination. La locomotive saisie en cette cause faisant, de l'aveu des demandeurs, partie de ce matériel, est conséquemment immeuble par destination, et ne peut être vendue qu'avec le chemin même. La loi est ici d'accord avec la raison et la justice.

AYLWIN, Juge.—Le certificat produit en cette cause pour constater l'assentiment des créanciers à l'acte d'arrangement est insuffisant et nul à raison d'une interligne qui s'y trouve.

DUVAL, Juge-en-Chef:—Le motif sur lequel la Cour rend jugement en cette cause, est que la locomotive est immeuble et fait partie du chemin de fer de même que la roue fait partie de la voiture.

The Court, &c.—Considering that the locomotive engine seized in this cause forms part of the rolling stock of the Grand Trunk Railway Company: Considering therefore that the said locomotive engine is an indispensable portion of the realty forming the said road, and is in law an immoveable, *immeuble par destination*, the Court doth reverse and set aside the judgment rendered in the Court below; and proceeding to pronounce the judgment which the Court below ought to have rendered, doth maintain the opposition of the said Grand Trunk Railway Company, and doth order that *main levée* be granted to them of the said seizure, the whole with costs.

Mr. Justice Meredith being absent when the judgment of the Court of Appeals was rendered, his opinion was not expressed, but his notes of judgment were as follows :

MEREDITH, Justice :—The ground upon which I deem it my duty to concur in the judgment now about to be rendered, is that I think the appellants are entitled to the benefit of the statutory arrangement which they have alleged. Under the statute it was necessary, in order that the arrangement thereby proposed should become effectual, that the Grand Trunk Co. should obtain the consent of "three-fourths *in amount* of the creditors of the company "resident in America, and of three-fourths of the creditors "resident in England." The word *amount* is used with reference to the creditors resident in America, and is omitted with respect to the creditors in England. I therefore think that with respect to the English creditors, the statute must be understood as requiring the assent of three fourths of those creditors not in *amount*, but in *number*. The respondents, *without admitting this*, contend, that if the statute ought to be interpreted as meaning three-fourths of the english creditors in *number*, even, in that case, the consent of the proportion required of the English creditors has not been obtained. According to the paper C. it seems that the english creditors are nine in number ; and the copies of assent produced purport to be signed by six only.

Glyn, Mills & Co. are among the six consenting creditors ; and Glyn & Co are among the three creditors who have not consented.

With reference to this point Mr. Hickson, the accountant of the company, says :

I have means, and have had, of seeing who the creditors of the company, defendants, were and are. Having seen all the books of the company, and having them in my charge, I can speak on the subject.

Having examined the Exhibits B and C filed by the

opponents in this cause, I say that said exhibits truly show who were the creditors of the defendants, at the dates mentioned at head of said exhibit, in Canada and America, and in England, respectively.

There were no other creditors in Canada or America, or in England, to be dealt with under "the Grand Trunk Arrangements Act of one thousand eight hundred and sixty-two," or the 25th Vict., Chap. 56.

And in another part of his deposition the same witness says :

In the Exhibit C., "Glyn & Co.," figure as creditors of the defendants ; "and Glyn, Mills & Co." also, but both are one and the same creditor, and the assent written by "Glyn, Mills & Co." covers the item opposite, "Glyn & Co.," in said Exhibit C.

This, certainly, seems very slender evidence to allow so important a case to rest on ; but the evidence of Hickson is distinct and positive ; no attempt has been made to weaken it by cross-examination, or to contradict it by evidence for the respondents ; and such being the case, it may, I think, be reasonably inferred that the statement of Hickson was deemed by both parties incontrovertible ; which would in some degree account for no attempt having been made to support it, by the appellants, or to impugn it, by the respondents.

The main point however relied on by the respondents was that their right to enforce their judgment against the Railway Co., could not be defeated or postponed without an actual payment to them of their share of the postal and military service moneys, and a tender of the stock to which they were entitled ; and they say (the statement in the abstract being quite correct) "that a promise to pay and "to tender, when the defendant gets the means to do so,

"cannot extinguish the debt or postpone the execution of the judgment."

On the other hand the railway company contended :

"That when the act came into full force, and the consents in sec. 23 referred to were given, from that moment the 25th section came into effect and no execution could be issued against the company by a creditor entitled to any of the postal moneys; and that although the debts were not barred or extinguished, unless on the payment and tender referred to in the 23rd sec., yet that the remedy by execution was taken away without any necessity of a payment or tender by the company.

This view seems to me well founded.

The Grand Trunk Co. being in embarrassed circumstances, and it being highly important to the public, to the stockholders, and to the creditors, and more particularly to the non privileged creditors, of whom the respondents were one, that the road should be kept open, and that the keeping of it open, as the Legislature have said, should not be "imperilled," the Legislature made a settlement between the appellants and their creditors, subject to its being ratified by the consent of a large majority of all the creditors, and of the different classes of those creditors.

The required consent, as I view the case, was afterwards given. By the settlement thus made a certain portion of the assets of the company was set apart, exclusively for the benefit of the non privileged creditors who thus became privileged creditors to the extent of the assets assigned, as it were, to them. It seems to me plain that as soon as the consent of the required proportions of the creditors was given, within the period allowed by the statute, the settlement became binding upon the mortgagees and bondholders so as to prevent them from attempting to divert the postal and military service moneys

from the non privileged creditors. And I think it equally plain that the agreement must have become binding upon both sides, and upon all parties at the same moment of time. And therefore that from the moment the postal and military service moneys became secured to the non privileged creditors, they became incapable of interfering, either by execution or otherwise, with the assets left for the satisfaction of the claims of the bondholders and mortgagees.

The Legislature have declared that the company may issue bonds to be secured—on the postal and military service moneys—and that such bonds may be issued in favour of the non privileged creditors—or that the company may dispose of such bonds and apply the proceeds to the payment of the non privileged creditors. For the exercise of the powers thus vested in the company, in the interest, it may be observed, of the non privileged creditors, a considerable period of time was required ; and it cannot be supposed that during the time so required the Legislature intended that the non privileged creditors should have the right to enforce their claims against the whole of the property of the company ; for the tendency of the statute, under that supposition, would be to invite the non privileged creditors to attempt at once to enforce their claims by execution, and in that way imperil the keeping open of the road ; which it was the avowed object of the Legislature to secure. The proceeding on the part of the respondents is also open to this objection—that if it were sanctioned the non privileged creditors would have all the advantages of the statutory settlement—and yet deprive the mortgagees and bondholders of the consideration for which those advantages were given.

It does not appear that there has been any want of diligence on the part of the company in endeavouring to make the postal moneys and military service moneys available to the creditors ; but even if there had been, the right of the

bank, in that case, would be to enforce the statutory arrangement and not to defeat it. Upon the whole, therefore, I am of opinion that the required proportions of the creditors gave their assent in due time to the Grand Trunk arrangements act of 1862, that from the time that assent was given, the postal moneys and military service moneys have been set apart for the benefit of the non privileged creditors, (the balances of whose claims are to be satisfied by an appropriation of stock in their favour), and that the non privileged creditors, whose claims have been thus provided for, cannot, in the mean time, enforce those claims against the other assets of the company, which, under the arrangement, are left for the satisfaction of the claims of the bondholders and mortgagees.

The right of the company to file an opposition under the circumstances just mentioned cannot, I think, be questioned.

For these reasons, I am of opinion that the execution sued out by the respondents ought to be set aside.

CARTIER & POMINVILLE, for appellants.

ROBERTSON, A. & W., for respondents.

BANQ DE LA REINE, } DISTRICT DE MONTRÉAL.
EN APPEL.

Présents :—DUVAL, Juge-en-Chef, AYLWIN, DRUMMOND
et MONDELET, Juges.

LACROIX *Appelant.*

et

MOREAU *Intimé.*

Jugé :—Qu'il n'y a pas appel à Sa Majesté en son conseil privé, d'un jugement de la Cour d'appel sur appel d'un jugement interlocutoire.

Held :—That there is no appeal to Her Majesty in her privy council, from a judgment of the court of appeals upon an appeal from an interlocutory order.

Jugement rendu le 8 juin, 1865.

L'appelant en cette cause ayant succombé sur son appel tendant à faire infirmer un jugement interlocutoire de la

Cour Supérieure, qui, le 31 octobre, 1862, maintenait une réponse en droit à une réponse spéciale faite par l'appelant aux exceptions de l'intimé, demanda le 8 juin, 1865, la permission d'en appeler à Sa Majesté en son conseil privé.

Cette demande fut incontinent rejetée par la Cour. Le motif de ce jugement, qui n'est pas exprimé, est qu'on ne peut appeler au conseil privé d'un jugement interlocutoire qui ne décide pas du sort du procès.

BARNARD, pour l'appelant.

LEBLANC et CASSIDY, pour l'intimé.

BANC DE LA REINE, } DISTRICT DE MONTRÉAL.
EN APPEL.

Présents :—AYLWIN, MEREDITH, MONDELET, et LORANGER, Juges.

MÉNÉCLIER DIT MOROCHOND.....*Appelante.*
et

GAUTHIER.....*Intimé.*

Jugé :—1o. Que la prescription ne court pas entre époux.

2o. Que le legs en usufruit par un mari à sa femme n'éteint pas le recours qu'avait cette dernière contre son mari ou ses héritiers pour reprises matrimoniales, et qu'il n'y a pas confusion en ce cas.

Held :—1o. That prescription does not run between man and wife.

2o. That the legacy *en usufruit* by a man to his wife does not make the latter lose her recourse against her husband or his heirs for *reprises matrimoniales*, and that confusion does not exist in such case.

Jugement rendu le 6 décembre, 1865.

François Ménéclier dit Morochond et Marie Françoise Gauthier, firent leur contrat de mariage devant Cadieux, notaire, le 18 juin, 1822, stipulant communauté de biens, réalisation des propres, donation mutuelle et douaire de 3,000 francs. La femme apporta des biens considérables, et en juin, 1826, elle obtint un jugement en séparation de biens. Elle renonça à la communauté et fit constater ses reprises par un rapport de praticien homologué le 19 février, 1827. Elle ne paraît pas cependant s'être jamais fait payer le montant de ses reprises.

François Ménéclier est ensuite décédé après avoir fait un testament par lequel il nommait sa femme sa légataire universelle en usufruit, sans être tenue de donner caution ou de faire inventaire, et instituant l'appelante sa légataire universelle en propriété.

Marie Françoise Gauthier, qui était en même temps exécutrice du testament de son mari, prit possession des biens délaissés par ce dernier, et en jouit jusqu'à son décès, tant en vertu du testament que de la donation contenue au contrat de mariage.

Elle passa depuis de vie à trépas laissant l'intimé son légataire universel à charge de substitution envers ses enfants.

En cette qualité l'intimé poursuivit l'appelante en recouvrement de la somme de \$8,150.35, montant des deniers perçus par Frs. Ménéclier et appartenant à sa femme, avec intérêt du jour de leur recette respective, et demandant de procéder au partage de la communauté qu'il prétendait n'avoir pas été dissoute.

L'appelante opposa à cette demande le fait de la mise à exécution de la séparation de biens prononcée en justice, et la prescription de trente ans.

Par une seconde exception elle plaida que le legs fait par Frs. Ménéclier à sa femme, était à la charge de *payer et acquitter les dettes du testateur*, frais funéraires et retribution de messes, et de payer une rente annuelle et viagère à l'appelante.

Le 27 novembre, 1863, intervint le jugement qui suit :

MONK, Juge :—“ Considérant que le demandeur a prouvé par une preuve légale et suffisante les allégations essentielles de sa déclaration, excepté en autant qu'il prétend que la communauté entre feu Ménéclier et son épouse en vertu du contrat de mariage en date du 18 juillet, 1822, n'a jamais été dissoute, et que la dite communauté existe encore ;

“ Considérant particulièrement qu’il appert par le contrat de mariage entre feu Ménéclier et son épouse, en date du 18 juillet, 1822, qu’il fut stipulé qu’il y aurait une communauté entre les conjoints ;

“ Qu’il y avait stipulation de propre des biens de la future à être constatés par un inventaire sous quinze jours du dit 18 juillet, 1822 ; qu’il était en outre convenu par le dit contrat de mariage qu’il y aurait un douaire préfix de 3,000 fr., ancien cours, en faveur de la future, et reprise en cas de dissolution de communauté, et que de plus les parties à cet acte se sont fait don mutuel en faveur du survivant ;

“ Considérant que par sentence de la ci-devant Cour du Banc du Roi, pour le district de Montréal, en date du 8 juin, 1826, une séparation de biens d’entre feu Ménéclier et son épouse a été prononcée ;

“ Vu que le 15 juin, 1826, la dite dame Ménéclier a produit devant le même tribunal sa renonciation à la communauté qui avait auparavant existé entr’elle et son mari, et que, par jugement de la même Cour en date du 3 octobre, 1826, acte lui a été accordé de la production de sa dite renonciation, et de la nomination d’un praticien pour établir ses reprises et droits matrimoniaux, et vu que le 19 de février, 1827, par le même tribunal, le rapport du praticien nommé pour constater les reprises et droits matrimoniaux de la dame Ménéclier a été homologué, et le dit feu Ménéclier condamné à payer à la dite Ménéclier, son épouse, la somme de 24,749 fr. 19, ancien cours, pour ses reprises et droits matrimoniaux tels que constatés et établis par le dit rapport ;

“ Considérant que, par les sentences interlocutoires et définitives, la communauté qui avait jusqu’alors existé entre feu Ménéclier et son épouse a été dissoute, et que le jugement prononçant la séparation de biens a été subsequmment exécuté et a eu son effet légal ;

“ Considérant que dans l'espèce actuelle, la prescription ne courait pas contre feue Marie Françoise Gauthier pour ses reprises et droits matrimoniaux pendant l'existence de son mariage avec feu Ménéchier son mari, et pendant qu'elle était sous puissance de mari, et vu que de fait il n'y a jamais eu de prescription acquise contre la dite dame Ménéchier pour ses reprises et droits matrimoniaux, tels que constatés par le dit jugement du 19 février, 1827, et qu'il appert par les défenses mêmes de la défenderesse que les reprises n'ont jamais été payées, et considérant de plus que les reprises et droits n'ont jamais été compensés ou éteints.

“ Considérant que, quoique par son testament solennel en date du 4 novembre, 1856, le dit feu Ménéchier a constitué sa dite épouse sa légataire universelle en usufruit de tous ses biens aux charges et conditions, *inter alia*, de payer et acquitter ses dettes, néanmoins dans l'espèce actuelle il n'y a pas eu confusion en la personne de la dite dame Ménéchier, son épouse.

“ Considérant que la dite dame Ménéchier, par son testament solennel en date du 29 décembre, 1858, a constitué le dit demandeur son légataire universel en usufruit de tous ses biens, et vu que le demandeur, comme tel légataire universel en usufruit a le droit de réclamer les dettes dues par le dit feu Ménéchier au temps de sa mort à son épouse, et le douaire établi par le contrat de mariage susdit :

“ Et considérant que la défenderesse n'a pas établi par aucune preuve légale et suffisante les allégations essentielles de ses défenses, excepté qu'en autant qu'elle a prouvé que la communauté entre feu Ménéchier et son épouse a été dissoute au temps et de la manière par elle allégué ; déboute les dites défenses et condamne la défenderesse à payer au demandeur la somme de quarante-et-un mille deux cent deux livres, un sol et quinze deniers, ancien cours, égale à la somme de six mille huit cent soixante-sept piastres, un centin, courant, savoir :

" 1° La somme de vingt-quatre mille sept cent trente-neuf livres, un sol et neuf deniers, anciens cours, égale à la somme de quatre mille cent vingt-trois piastres et dix-huit centins, courant, montant des reprises matrimoniales telles que constatées par le jugement du dix-neuf février, mil huit cent vingt-sept, ci-haut mentionné ;

" 2° La somme de treize mille quatre cent soixante et trois livres et six deniers, ancien cours, égale à la somme de deux mille deux cent quarante trois piastres et quatre vingt trois centins, courant, pour le montant dont elle, la dite feue Dame Marie Françoise Gauthier, a hérité de feu Louis Gauthier, son père, tel que constaté par l'acte de partage en date du quatorze février, mil huit cent vingt-quatre, de la succession du dit feu Louis Gauthier ; et enfin la somme de trois mille livres, anciens cours, égale à la somme de cinq cent piastres, courant, pour le montant du douaire préfix de la dite dame Marie Françoise Gauthier, établi en sa faveur par son dit contrat de mariage, en date du dix-huit juillet, mil huit cent vingt-deux, avec intérêt sur la dite somme de six mille huit cent soixante-et-sept piastres et un centin, à compter du 26 juillet, 1861, date de la mort de la dite Dame Marie Françoise Gauthier, jusqu'à l'actuel paiement et aux dépens.

L'appelante prétendit :

1° Que la séparation de biens entre M. F. Gauthier et Frs. Ménéclier, avait été accomplie et exécutée par la renonciation à la communauté plus de 30 ans avant la demande en cette cause, et que les créances de la femme étaient ainsi prescrites. (1)

2° Qu'il s'était opéré confusion par l'acceptation de M. F. Gauthier du legs a elle fait par son mari. (2)

3° Qu'en acceptant le don mutuel, elle faisait confusion du douaire par elle réclamé. (3)

(1) Bender et Jacobs, 1 Rev. de Lég. p. 332 :—Sénécal vs Labelle, 1 L. C. Jurist, p. 273.

(2) Nouv. Den, vbo. Contribution aux dettes, p. 499, No. 8 :—10 Demolombe, 461 et suiv. :—Lacombe, vbo. Usufruit, p. 818, sec. 2.

(3) Pothier, Douaire, No. 193, 4e alinéa :—Arrêt du 11 août, 1710, 5 Jour. Aud.

4° Que l'intimé avait déclaré dans l'inventaire du 29 juillet, 1861, qu'il ne connaissait aucune dette due à madame Ménéchier.

BETOURNAY, pour l'intimé :—

1° La créance du demandeur n'est pas prescrite, tous les auteurs sont d'accord à dire que la prescription ne court pas entre époux ; et l'intimé à l'appui de cette proposition réfère aux autorités sur ce sujet. (1)

2° Cette créance de l'intimé n'a pas pu être éteinte par la confusion. Madame Ménéchier n'a jamais en aucun temps réuni en sa personne les qualités de créancière et de débitrice de la créance réclamée par le présent intimé ; on se rappelle que madame Ménéchier, par son contrat de mariage du 18 juillet, 1822, avait en cas de survie la jouissance de tous les biens que délaisserait son époux à sa mort ; elle a donc joui de ces biens en vertu du don mutuel stipulé à son contrat de mariage ; mais en assumant qu'il y aurait suffisamment au dossier pour établir qu'elle avait perdu l'avantage de se prévaloir de cette stipulation de don mutuel entrée à son contrat de mariage, et que ce n'est qu'en sa qualité de légataire en usufruit de feu François Ménéchier dit Morochond qu'elle a joui des biens délaissés par ce dernier, cette qualité ne peut pas avoir éteint sa créance par la confusion ; elle n'a pu, tout au plus, que lui faire perdre l'intérêt de cette créance, et c'est ce qu'a adjugé le tribunal de première instance en ne faisant courir les intérêts sur cette créance qu'à compter de la mort de madame Ménéchier. (2)

Quoi qu'il y ait confusion d'action pendant la jouis-

(1) Pothier, Puissance du Mari, Nos. 79, 80 :—Pothier, Obligations, No. 680 :—Lebrun, Communauté, p. 345, liv. 3, cap. 2, sec. 1, dist. 1, No. 28, un mari ne peut jamais prescrire contre sa femme :—Le même, pp. 505, 506 :—Pothier, Introduction à la coutume d'Orléans, p. 487, No. 39 :—Code Civil, article 253, elle (la prescription) ne court pas entre époux :—2 Troplong, Des Prescriptions, p. 271, No. 742 :—Id. Additions, p. 667 :—4 Proudhon, p. 92, No. 1909. Non-seulement le mari ne peut prescrire, mais il est même responsable des prescriptions acquises contre sa femme pendant le mariage :—4 Troplong, Mariage, pp. 690 et 691, Nos. 3585 et suiv.

(2) Pothier, Obligations, Nos. 642, 643 :—Ricard, des donations, Vol. 2, p. 483.

sance de l'héritier (c'est-à-dire du grevé de substitution) néanmoins, après la restitution, les action actives qu'il avait contre la succession revivent, à moins que le testateur ne lui ait imposé la condition de remettre son dû, et les actions passives que le défunt avait contre lui reprennent aussi leurs forces en faveur du fidéicommissaire.

Plus haut, l'auteur avait dit : "ce qui est laissé par le défunt à son héritier n'est pas présumé dans le dessein de compenser."

La restitution doit s'opérer en entier, lors même que le mari aurait fait un legs à sa femme. La dot n'est pas compensée par le legs. (1)

La charge de payer les dettes et frais funéraires ne regarde que l'exécution du testament, et n'impose à la légataire en usufruit et exécutrice que l'obligation de les payer à même les biens de la succession.

Tous les exécuteurs testamentaires sont chargés de payer les dettes et legs, mais cela ne s'entend pas qu'ils doivent le faire de leurs propres deniers. (2)

La coutume dit payer et avancer.

Le donataire mutuel, n'ayant que la jouissance de la part du prédécédé dans les biens de la communauté, il ne doit être tenu qu'à faire l'avance des dettes et charges, etc., etc. (3)

"Lorsque les conjoints ne se sont pas fait don mutuel en propriété de leurs biens meubles et conquets, comme

(1) Troplong, Contrat de mariage, vol. 4, No. 3619.

(2) Bourjon, vol. 2, p. 327, chap. 4, des testaments, sec. 2, art. 9 et suiv. — Pothier, Des donations, vol. 4, p. 292, Nos. 231, 232, 233, 234 et 235. Explication de l'art. 286 de la Coutume de Paris.

(3) Pothier, vol. 4, p. 324. Interprétation de l'article 63 de la Coutume de Dauphinois qui contient ces termes : "Et payer les dettes, legs et funérailles du premier décédé, etc."

“ la coutume le leur permet, mais se sont fait ce don mutuel seulement en usufruit, les héritiers du donataire mutuel, lors de la restitution qu'ils doivent faire aux héritiers du prédécédé des biens dont le donataire a joui, doivent retenir sur les dits biens tout ce que le donataire mutuel a payé pour dettes, legs et funérailles du prédécédé, car ce sont charges des dits biens, qui les diminuent de plein droit.”

Le jugement dont est appel est bon et doit être confirmé par ce tribunal. Rien ne peut empêcher l'intimé d'être payé et remboursé du montant qui lui a été accordé par la Cour de première instance, savoir, de la somme de \$6867.00 courant, composée des sommes suivantes, savoir :

1° Montant du douaire stipulé sans retour, \$500.00. (1)

2° Somme de \$4123.18, valeur des meubles et argent sonnait mentionné en l'inventaire annexé au contrat de mariage des époux Ménécier. (2)

3° Le montant de la succession de feu Louis Gauthier, père de madame Ménécier, \$2243.83. (3)

L'intimé avait droit aux intérêts qui lui sont accordés par la Cour Inférieure. (4)

Pothier, Communauté, 521. Il alloue à la femme l'intérêt de sa dot du jour de la demande en séparation, mais dans le cas actuel, la femme ayant joui des biens de son mari, l'intimé admet qu'il peut y avoir eu confusion d'in-

(1) 4 Pothier, p. 293, No. 224 :—Bourjon, vol. 1, p. 722 du Donaire, titre 13, sec. 4 et suiv.

(2) Pothier, Communauté, Nos. 298 et 300 :—Lebrun, p. 247, Nos. 47 et 48 :—Tropiong, Contrat de Mariage, Nos. 1966, 3623 et 3633.

(3) Pothier, Communauté, No. 300 :—Lebrun, p. 247, Nos. 47 et 48 :—Lebrun, p. 477 :—4 Tropiong, Contrat de Mariage, Nos. 3586, 3589, 3590 :—Cubain, Traité des droits des femmes, p. 180, No. 312.

(4) Guyot, Rep., vbo. Intérêt, pp. 459, 460.

intérêts, et c'est pour cela que ces intérêts ne doivent courir que du jour de la mort de madame Ménéclier. (1)

LAFRENAYE & ARMSTRONG, pour l'appelante.

CARTIER, POMINVILLE et BETOURNAY, pour l'intimé.

BANC DE LA REINE, }
EN APPEL. } DISTRICT DE MONTRÉAL.

Présents :—DUVAL, Juge-en-Chef, AYLWIN, MEREDITH,
DRUMMOND et MONDELET, Juges.

PATOILLE..... *Appelant.*

et

DESMARAIS..... *Intimé.*

Jugé :—Que la demande en déclaration de paternité peut être portée par l'ayeul, sans qu'il y ait tutelle à l'enfant, la mère étant mineure ; et que la Cour peut sur telle demande accorder des aliments, tant pour le passé que pour l'avenir, et sans qu'il soit besoin de nouvelle action pour les aliments futurs.

Held :—That a demand en *déclaration de paternité* may be made by the grand father, without any tutor to the child, the mother being a minor ; and that the Court may upon such demand award *aliments*, as well for the past as for the future, and without the necessity of a new action for the future *aliments*.

Jugement rendu le 8 septembre, 1865.

L'intimé poursuivait l'appelant en recouvrement de dommages pour séduction de sa fille, frais de gésine, avec conclusions à l'effet de faire déclarer l'appelant père de l'enfant né de ce commerce illégitime, et l'obliger de pourvoir à sa subsistance.

Le jugement suivant fut rendu sur cette action par LORANGER, Juge :

“ La Cour, etc.—Considérant qu'il résulte de la preuve
“ que le défendeur a été l'auteur de la grossesse de la fille
“ mineure du demandeur, Marie Athalie Desmarais, qui, le

(1) Lebrun, p. 422, No. 23 :—1 Ferrière, Parfait notaire, p. 139 :—Massé, vol. 1, p. 276 :—Tropiong, Contrat de Mariage, No. 3672 :—Rousseau de Lacombe, Intérêts, p. 383, No. 11, intérêts du donaire dus du jour qu'il est échu, même dans les coutumes où il faut le demander ; et voyez un rapport de cette cause en Cour de première instance, au 7 L. C. Jurist, p. 320.

" 16 mars, 1863, est accouchée d'un enfant naturel, baptisé
 " en la paroisse de St. Charles Borromée, sous le nom de
 " Marie Des Angès, née de parents inconnus, déclare
 " le défendeur, le père de la dite Marie Des Angès, et
 " comme tel chargé de la pension, entretien et éducation
 " de son enfant, le condamne à payer au demandeur, que
 " la Cour charge de la pension et entretien de cet enfant
 " jusqu'au 8 juin, 1869, jour où la dite Marie Athalie Des-
 " marais atteindra son âge de majorité, une rente et pen-
 " sion viagère pour la pension et entretien, de douze
 " louis par année, depuis le 16 mars, 1863, jusqu'au 16
 " mars, 1867, et de £18 0 0 courant depuis ce dernier jour
 " jusqu'au 8 juin, 1869, la dite rente payable d'avance par
 " quartiers de trois mois en trois mois, dont le premier se
 " fera le 16 décembre prochain, et dont les arrérages depuis
 " la naissance de l'enfant jusqu'à ce jour, y compris le
 " quartier commençant le 16 septembre dernier, s'élève à
 " £21 0 0 courant, que la Cour condamne le défendeur à
 " payer au demandeur avec intérêt de ce jour, pour laquelle
 " somme et pour les quartiers à écheoir, exécution sera
 " émanée sur défaut de payer les arrérages sous 15 jours,
 " et les termes futurs au temps de leur échéance respec-
 " tive, sans qu'il soit besoin de condamnation ultérieure.

" Condamne de plus le défendeur à payer au deman-
 " deur £2 10s 0 courant, pour frais de gésine et de rele-
 " vailles de la dite Marie Athalie Desmarais, etc.

" Et la Cour déboute le demandeur du surplus de ses
 " conclusions, c'est-à-dire, pour dommages et intérêts."

DUVAL, Juge-en-Chef :—Dans ce pays où toutes les
 tutelles sont datives, le père ne peut exercer en justice les
 droits de ses enfants mineurs, sans avoir la qualité de
 tuteur ; mais il faut observer que la demande portée par
 le père n'est pas pour les dommages soufferts par sa fille,
 mais bien pour ceux qu'il souffre lui-même ; sa fille va
 maintenant lui rester sur les bras, il n'est donc que juste

de lui accorder des dommages, et le jugement sera confirmé.

Le jugement en appel est comme suit :

La Cour, etc.—Considérant qu'il n'y a pas erreur dans le jugement dont est appel, confirme le dit jugement, avec dépens.

LEBLANC & CASSIDY, pour l'appelant.

DORION & DORION, pour l'intimé.

QUEEN'S BENCH, } DISTRICT OF MONTREAL.
APPEAL SIDE.

Before:—DUVAL, Chief-Justice, AYLWIN, DRUMMOND, and
MONDELET, Justices.

BOVE.....*Appellant.*

and

MCDONALD *et al.*.....*Respondents.*

Held:—In the Superior Court.—1e. That the holder of a promissory note is bound only to deliver such note to a caution on notarial tender by such caution of the amount due, and is not bound to execute any formal subrogation.

2o. That in an action against the makers and caution, the latter was bound to renew his tender and offer in Court.

3o. That, in the case submitted, the insolvency of the makers of the note was proved to have taken place after the tender.

In appeal:—Judgment confirmed on the ground first above stated.

Jugé:—Dans la Cour Supérieure.—1o. Que le porteur d'un billet promissaire est seulement tenu de livrer tel billet à une caution, sur offre par telle caution du montant dû, et n'est pas tenu de faire une subrogation formelle.

2o. Que dans une action contre les faiseurs et la caution, ce dernier était tenu de renouveler ses offres en Cour.

3o. Que, dans l'espèce, l'insolvabilité des faiseurs du billet était prouvée avoir eu lieu après les offres.

En Appel:—Jugement confirmé par le motif ci-dessus premièrement donné.

Judgment rendered the 8th September, 1865.

The action was brought in the Superior Court, district of Iberville, against the appellant as universal legatee, under the last will of her deceased husband, Henri Tugault, and against Raphaël Chéné and Olivier Hébert, to recover the amount of a promissory note of the 29th May, 1854, made by the said Chéné and Hébert, in favor of the respondents, payable 8 months after date, upon which was the follow-

ing indorsement: "Après avoir pris communication du
 " billet d'autre part, souscrit pour la somme de cent livres,
 " courant, par Raphaël Chéné et Olivier Hébert, en faveur
 " de E. et D. McDonald, je me porte caution solidaire vis-
 " à-vis des dits E. et D. McDonald pour le montant du
 " dit billet."

The appellant pleaded, in effect, that Tugault, fearing the insolvency of the makers of the note, tendered to the respondents, on the 25th of August, 1856, by notarial tender and protest of that date, the amount then due on the said note in capital and interest, on condition that the respondents should subrogate him in, and cede to him, all their rights with respect to the said note, and at the same time surrender to him (Tugault) the note itself, and all papers connected therewith; that the respondents had absolutely refused to accede to his demand; that the makers of the said note were solvent at the date of said tender, and, after the said tender, became insolvent; and that in consequence of the respondents' refusal as aforesaid, he (Tugault) had lost all recourse against the makers whose insolvency had become complete. The prayer of the plea demanded the dismissal of the action.

The answer of Edward McDonald, one of the respondents to whom the tender was made, was: "Je suis prêt
 " à recevoir le montant de ce billet, mais je ne veux signer
 " aucun document avant de prendre des informations."

To this plea the respondents answered that they were not bound to do more than give back the note to Tugault, and were not bound to give any subrogation, and that the makers were not insolvent to any greater extent at the date of the action, than at the time the tender was made.

Judgment, 27th November, 1863, LORANGER, Justice:

La Cour, etc.—"Considérant que les demandeurs ont prouvé, ce qui d'ailleurs n'a pas été nié, que feu Henri

Tugault, le mari de la défenderesse, et dont cette dernière est légataire universelle, s'est, le trente mai, mil huit cent cinquante-quatre, rendu caution solidaire des nommés Raphaël Chéné et Olivier Hébert au montant d'un billet promissoire pour cent louis, consenti à huit mois, le vingt-neuf mai, mil huit cent cinquante-quatre, en faveur des demandeurs, avec intérêt, et que les demandeurs n'ont pas encore reçu le montant d'icelui billet, ni en capital ni en intérêt :

“ Considérant que la défenderesse n'a point prouvé, ce qui est allégué en son exception péremptoire, que le vingt-cinq mai, mil huit cent cinquante-six, date des offres à derniers découverts du montant du dit billet en capital et en intérêts alors dus, faites par le dit Henri Tugault aux demandeurs avec requisition de le subroger dans leurs droits et actions contre les dits Raphaël Chéné et Olivier Hébert, ces derniers fussent alors en état de solvabilité, et qu'ils sont devenus insolvable depuis :

“ Considérant qu'il n'est pas non plus établi, ce qui est aussi allégué dans la dite exception, que les demandeurs ont refusé d'accepter ces offres, et que ce refus a été motivé par les intérêts excessifs qu'un des faiseurs du billet, Raphaël Chéné, leur a payés sur icelui :

“ Considérant en outre que pour prendre avantage de ce refus et faire retomber sur les demandeurs la prétendue insolvabilité des débiteurs principaux, les dits Chéné et Hébert, survenue depuis les offres de la caution, le dit Henri Tugault eût dû renouveler ses offres en justice, ce qu'il n'a point fait, et que pour les raisons ci-dessus la dite exception est mal fondée, a rejeté et rejette icelle exception :

“ Et faisant droit, condamne la défenderesse à payer la somme de cent louis, montant du billet, etc.

Certain admissions were given in the Court below by the plaintiff, as to the sale of the real and personal pro-

perty of the makers of the note by the sheriff, which need not be given, as the judgment in appeal rests on another ground.

DUVAL, Chief-Justice :—Stated that the only question in the case was as to whether a surety on a promissory note was entitled to insist on having a formal subrogation from the holder, on paying the note. The Court held no such subrogation was necessary. The surety was entitled to get the note delivered up to him and this was sufficient. The judgment of the Court below would therefore be maintained.

BÉLANGER & DESNOYERS, for appellant.

BETHUNE, Q. C., for respondents.

BANC DE LA REINE, } DISTRICT DE MONTRÉAL.
EN APPEL.

Présents :—DUVAL, Juge-en-Chef, AYLWIN, DRUMMOND et MONDELET, Juges.

THE ONTARIO BANK.....*Plaintiffs.*

VS.

DUCHESNAY.....*Defendant.*

Jugé :—Qu'il n'y a pas lieu à appel d'un jugement interlocutoire à l'enquête, maintenant l'objection des demandeurs à l'audition du mari de la défenderesse comme témoin.

Held :—That there is no appeal from an interlocutory order at *enquête*, maintaining the objection of the plaintiffs to the hearing of the husband of the defendant as a witness.

Jugement rendu le 8 juin, 1865.

La contestation en cette cause ayant été liée entre les parties, et la cause inscrite sur le rôle des enquêtes, Maurice Cuvillier, le mari de la défenderesse, Marie V. J. Duchesnay, fut produit comme témoin par cette dernière. Les demandeurs s'opposèrent à l'audition et à la prestation de serment de ce témoin, sur le seul motif qu'il était le mari de la défenderesse. Cette objection fut maintenue par M. le juge Berthelot, président alors aux enquêtes, et cette

décision fut ensuite maintenue et confirmée par M. le juge Badgley, le 29 avril, 1865. (1)

Le 1er de juin, 1865, la défenderesse s'adressa à la Cour du Banc de la Reine pour en obtenir la permission d'appeler du jugement ainsi rendu par M. le juge Badgley.

La Cour d'Appel, sans déclarer comme règle générale que le mari ne peut en aucun cas être témoin pour ou contre sa femme, refusa néanmoins la permission d'appeler, considérant que le jugement en question ne tombe dans aucune des catégories de jugements interlocutoires dont la loi permet l'appel.

ABBOTT & DORMAN, pour les demandeurs.

CROSS & LUNN, pour la défenderesse.

SUPERIOR COURT.—MONTREAL.

Before:—BADGLEY, Justice.

No. 2624.	{	MIGNAULT.....	<i>Plaintiff.</i>
		BONAR.....	<i>Defendant.</i>
		vs.	

Held:—1o. That a protestant minister is liable in damages for celebrating the marriage of a minor, daughter of the plaintiff, without the plaintiff's knowledge and consent; and this notwithstanding he acted by virtue of the marriage license usually issued in such cases.

2o. That, under the circumstances of the case, such damages will be restricted to one hundred dollars and costs of the lowest class of actions in the Superior Court.

Jugé:—1o. Qu'un ministre protestant est responsable en dommages pour la célébration du mariage de la fille mineure du demandeur, hors la connaissance de ce dernier et sans son consentement; et ce nonobstant qu'il fût muni de la licence ordinaire en pareil cas.

2o. Que, dans les circonstances de la cause, les dommages seront restreints à la somme de cent piastres et les frais de la dernière classe d'actions de la Cour Supérieure.

Judgment rendered the 30th November, 1865.

The action was brought by the plaintiff, a *bourgeois* of the city of Montreal, against the defendant, minister of the American Presbyterian Church, Montreal, to recover £500 currency, damages, for having celebrated a marriage be-

(1) 15 Déc., B. C., 463.

tween the plaintiff's minor daughter, Zoé Mignault, to one Frederick Hapinian, without publication of *bans*. The declaration alleged the minor to have been of the age of 18 years and 7 months, and that the person to whom she was married was an *aventurier sans ressources aucunes et sans religion*, and that the plaintiff had been injured in his feelings and affections, and the future of his daughter irrevocably compromised.

The defendant's plea admitted that he had celebrated the marriage, and alleged that in so doing he had only performed his public duty, that he was wholly ignorant that Zoé Mignault was a minor, that both she and the husband represented her to be of age, and, moreover, that the marriage was solemnized in good faith on the part of the defendant, and in virtue of a license, after a bond had been duly given, and without suspicion or knowledge of any impediment or cause against the marriage, and that therefore no damages could be recovered against the defendant, nor had the plaintiff suffered any damage, and that the marriage had not been followed by any cohabitation, the minor having immediately after the marriage returned to her father's house and there remained.

The answer of the plaintiff was to the effect that ignorance of the minority could not excuse the defendant, that, on the contrary, his duty was to find out whether she was a minor, that the license was no justification for the breach of the law, which forbid the marriage of minors without the consent of their parents or guardians, but was simply an authorization to celebrate the marriage after being fully satisfied that no impediments existed to it.

The facts elicited in proof sufficiently appear from the remarks of the judge in rendering the judgment.

BADGLEY, Justice:—The action is brought to recover damages against the defendant for having celebrated a marriage between the plaintiff's minor daughter and a

stranger. It appears in evidence that the plaintiff and his family have lived in the United States, his daughter, Susan, as she signed on the license, or Zoé Mignault as in her *extrait de baptême*, spoke english and french. The bridegroom Hapinian came to Montreal from the United States, and took her with her brother for a drive in a sleigh, but sent off the boy to the Post Office, and then drove to the residence of the defendant with a license in his pocket, where they were married, and went back at once to the plaintiff's house. The father appears to have been ignorant of the marriage for some time. The daughter, when examined as a witness for the plaintiff, says she stood up and something was said, but that she had no intention of getting married, a very unlikely story, indeed, and not in accordance with the other evidence in the case.

The defendant does not appear to have asked her, before the marriage, whether or not she was a minor, but did so immediately after, and found out she was a minor, but too late.

In referring to the case of Larocque and Michon, (1) I perceive that although it differs in some respects from the present case, yet it lays down the principle that a clergyman, who celebrates the marriage of a minor, without the consent of her parent or guardian, is liable in damages. I am disposed to look favorably on the defendant's acts in this case,—he was misled by the statements of the parties themselves, and by the appearance of the daughter who looked as though she had attained the age of majority; but the defendant did not make sufficient enquiry before hand,—and there is the law which requires the consent of the parents or guardians of a minor.

There must, therefore, be a judgment for damages.

Judgment.—The Court, &c.—“Considering that the

(1) 3 L. C. Rep., p. 222 :—1 L. C. Jurist, p. 187 :—2 L. C. Jurist, p. 267.

plaintiff hath established the material allegations of his declaration, doth reject the pleas of the defendant, and doth condemn the defendant to pay to the plaintiff the sum of \$100 damages, for the causes, matters and things set out in the declaration, with interest from the 8th November, 1864, date of service of process, and costs of suit as in the lowest class in the Superior Court.

JETTÉ, for plaintiff.

DORMAN, for defendant.

BANC DE LA REINE, } DISTRICT DE MONTRÉAL
EN APPEL.

Présents :—DUVAL, Juge-en-Chef, AYLWIN, DRUMMOND
et MONDELET, Juges.

LA CORPORATION DE LA PAROISSE ST. LIBOIRE... *Appelante.*
et

LA COMPAGNIE DU GRAND TRONC DE CHEMIN
DE FER DU CANADA..... *Intimée.*

Jugé :—Que les municipalités ne peuvent imposer à la Compagnie du Grand Tronc de Chemin de Fer du Canada, l'obligation de faire des travaux de communication publique, indépendants de ceux qui sont requis pour la voie ferrée.

Held :—That municipalities have no right to impose upon the Grand Trunk Railway Company of Canada, the obligation of performing works in relation to public roads, independently of those required for its railway.

Jugement rendu le 8 septembre, 1865.

En 1856, la paroisse St. Liboire obtint l'homologation d'un procès-verbal établissant, dans ses limites, un chemin qui traversait la voie ferrée de la compagnie, intimée, et ce procès-verbal ordonnait que la compagnie construirait un pont pour faire passer ce chemin de traverse au-dessus de la voie ferrée, et à une élévation suffisante pour laisser passer au-dessous les chars du chemin de fer.

La compagnie ne se crut pas liée par ce procès-verbal, mais pour accommoder le public, elle fit construire un pont à sa convenance pour permettre de traverser la voie ferrée.

La Corporation de la paroisse St. Liboire porta son action en alléguant le procès-verbal en question, et le refus de la compagnie de s'y soumettre ; et concluant à ce que la compagnie fut condamnée à faire le pont tel qu'ordonné par le procès-verbal, et qu'à défaut par elle de le faire, elle fût condamnée à payer la somme de \$500, valeur du dit pont, pour mettre la paroisse de St. Liboire en état de le faire.

À cette action la compagnie répondit :

1° Qu'elle ne pouvait être poursuivie pour la confection de ce pont et chemin sans avoir été mise en demeure par l'inspecteur, ni avant que l'ouvrage n'eût été fait ;

2° Qu'elle ne pouvait être obligée et contrainte à faire à ses frais et dépens des travaux de la nature de ceux réclamés, et qui étaient en dehors de ses besoins ;

3° Que le procès-verbal était illégal et nul, en autant qu'il s'agissait d'un pont de plus de huit pieds, qui devait conséquemment être aux frais de tous les intéressés ; que le surintendant qui avait préparé le procès-verbal n'avait pas donné les avis voulus par la loi ; que le chemin s'étendait jusque dans une municipalité voisine, et que le procès-verbal n'y avait pas été déposé ;

4° Que ce nouveau chemin n'ayant été établi que postérieurement à la construction du chemin de la compagnie, cette dernière ne pouvait être tenue d'y contribuer ; que dans tous les cas, elle ne pouvait y être tenue que dans la même proportion que les autres intéressés dans la paroisse ;

5° Que sans y être aucunement obligée, elle avait néanmoins fait construire un pont suffisant pour les besoins du public.

Le 25 février, 1863, à St. Hyacinthe, BADGLEY, Juge, rendit le jugement qui suit :

“ La Cour, etc.—Attendu que le chemin de front men-

tionné en la déclaration de la demanderesse, et verbalisé par le procès-verbal enfilé en cette cause et homologué par le conseil municipal de la paroisse de St. Simon, a été établi plusieurs années après que le chemin ferré de la défenderesse a été bâti et en opération ; et attendu que le pont réclamé par la demanderesse, et mentionné en la déclaration en cette cause, est un pont public, lequel, par la loi, était à la charge de tous les contribuables de la dite municipalité, (demanderesse) et attendu que la dite défenderesse ne pouvait en loi être tenue à faire le dit pont à ses frais propres, et que le dit procès-verbal homologué comme dit est, mettant le dit pont aux charges particulières de la défenderesse, n'est pas légal et en conformité à la loi ; et attendu que la dite demanderesse n'a pas droit d'action contre la défenderesse, déboute la dite action de la demanderesse, avec dépens."

C'est de ce jugement qu'était appel :

MONDELET, Juge :—Il me paraît que le jugement dont est appel est exact et doit être confirmé.

La Corporation de la paroisse de St. Liboire a la prétention de faire faire par la défenderesse un pont qui, par la loi, doit être aux charges des intéressés qui en ont besoin.

D'ailleurs, le chemin de fer de la défenderesse ayant été fait plusieurs années avant la confection du procès-verbal qui ordonne la construction du pont dont il est question, de quel droit peut-on assujettir la Compagnie du Grand Tronc à faire ce pont ?

Ainsi, outre les irrégularités apparentes du procès-verbal, je ne vois, en loi, aucune autorité qui puisse, dans les circonstances actuelles, obliger la Compagnie du Grand Tronc à la construction de ce pont.

Que ceux qui ont besoin de ce pont le fassent, et le fassent à leurs dépens. Ce serait, certes, un admirable expédient

que celui-là, pour faire construire par le Grand Tronc les ponts dont les municipalités donneraient l'ordre, exonérant les habitants qui en ont besoin d'en faire les frais, dont on chargerait le Grand Tronc qui n'en a pas besoin.

DUVAL, Juge-en-Chef.—Il n'y a pas de loi qui impose à la Compagnie du Grand Tronc l'obligation de faire ce pont, cela décide la question.

La Cour, etc.—Considérant qu'il n'y a pas mal jugé dans le jugement rendu par la Cour Supérieure à St. Hyacinthe, le 25 février, 1863, confirme le dit jugement, avec dépens.

DORION & DORION, pour l'appelante.

CARTIER & POMINVILLE, pour l'intimée.

BANC DE LA REINE, } DISTRICT DE MONTREAL.
EN APPEL.

Présents :—AYLWIN, MEREDITH, DRUMMOND et MON-
DELET, Juges.

GIARD, *et al.*..... *Appellants.*

et

LAMOUREUX *Intimé.*

Jugé :—Que suivantes dispositions du chapitre 64 des Statuts Refondus du Bas-Canada, un billet promissaire est censé absolument payé et acquitté cinq ans après son échéance, et qu'il n'y a pas action pour en obtenir le recouvrement, même contre un défendeur en défaut de comparaitre.

Held :—That according to the provisions of the Consolidated Statute of Lower-Canada, chapter 64, a promissory note will be held to be absolutely paid and discharged five years after it has become due and payable, and that no action upon it can be maintained, even against a defendant making default.

Jugement rendu le 9 décembre, 1865.

Les appelants poursuivaient, devant la Cour de Circuit, pour le district de Richelieu, l'intimé et un nommé Jean Baptiste Dandelin, pour le recouvrement de la balance restant due sur un billet de £25, consenti par les

deux défendeurs en faveur d'Alexis Giard, dont les appelants se disaient exécuteurs testamentaires et fidéicommissaires, le dit billet en date du 29 mars, 1856, et payable un an après cette date. Les demandeurs réclamaient aussi l'intérêt au taux de huit par cent sur promesse des défendeurs.

Lamoureux ne comparut pas, mais Dandelin plaida prescription suivant le statut, et paiement, produisant au soutien de telle exception de paiement un reçu de l'un des appelants pour la somme de £25 10, qui, avec £12 que les appelants reconnaissaient par l'action avoir déjà reçus, complétaient le montant dû au taux de six pour cent.

La Cour de Circuit débouta l'action quant à Dandelin, sur le plaidoyer de prescription, déboutant néanmoins l'exception de paiement, mais condamna Lamoureux à payer le montant réclamé.

Lamoureux inscrivit la cause pour être entendu en révision, à Montréal, et après audition, le jugement suivant fut rendu le 25 janvier, 1865 :

" The Court, now here, sitting as a Court of Review,
 " &c.—Considering that, at and long before the institution
 " of this action the said promissory note in the plaintiff's
 " declaration in this cause first mentioned, and for the recovery of the amount whereof this action was instituted
 " against the defendants, had been and was paid and discharged, with interest thereon, as appears by proof of
 " record, and that at the institution and return of the said
 " action, no cause of action existed in the said plaintiffs in
 " their said quality against the said defendants, either jointly or severally, doth reverse so much of the judgment rendered in this cause by the Circuit Court for the district of
 " Richelieu, dated the sixteenth day of November last, as
 " adjudges the said defendant F. Lamoureux to pay to the
 " plaintiffs the amount of the said promissory note, with in-

"terest and costs, as in the said judgment mentioned, "there being error in so much as aforesaid of the said judgment; and proceeding to render the judgment that "the said Circuit Court should have rendered in respect "of the said defendant F. Lamoureux, doth dismiss the "said action as to the said F. Lamoureux, with costs of this "Court of Review."

C'est cette décision que les appelants cherchaient à faire infirmer, prétendant que la prescription est un moyen que les tribunaux ne peuvent suppléer d'office. (1)

Que Lamoureux ayant fait défaut ne pouvait se prévaloir de la défense opposée à l'action par Dandelin. (2)

Que le défendeur Lamoureux ayant fait défaut était censé admettre la qualité des appelants. (3)

L'intimé se reposait uniquement sur la 31^e section du chapitre 64 des Statuts Refondus, sur lequel était basé le jugement rendu en révision par la Cour Supérieure.

Ce jugement a été confirmé en appel, considérant qu'il n'y avait pas erreur. (4)

SICOTTE et RAINVILLE, pour l'appelant.

LAFRENAYE et BRUNEAU, pour l'intimé.

(1) Pothier, Obligations, Nos. 676, 677 :—Code Civil du B. C., art. 5, de la Prescription.

(2) Pothier, Obligations, 782.—13 Duranton, No 230 :—8 Toullier, No. 405.

(3) Berthelot vs. Robitaille, K. B. Q., 1813 :—Auld vs. Milne, K. B. Q., 1819 :—Robertson's Digest, vbo. Evid., p. 162.

(4) Vide supra, p. 73, Bowker et Fenn.

SUPERIOR COURT.—IBERVILLE.

Before :—SICOTTE, Justice.

No. 301. { THE SCHOOL COMMISSIONERS
OF ST. BERNARD DE LACOLLE.....*Plaintiffs.*
vs.
BOWMAN.....*Defendant.*

Held :—1o. That under the Lower Canada School Act, Con. Stat. L. C., chap. 18, dissentients have a right to determine and limit the application of their school assessments and rates to schools of their own religion; and that this right does not depend on difference of locality, but is a personal right belonging to dissentients *in omni loco*.

2o. That the intention of the legislature in passing the school act was to protect and guaranty every religious belief against teaching repugnant to it, and that it would be contrary to this intention, and to the letter and spirit of the law, so to construe or apply it as to destroy this protection and guarantee.

3o. That the legal meaning of the word *inhabitants* in the 55th sect. of the act, does not exclude persons residing out of the limits of a municipality, but who are proprietors of land within it, but on the contrary includes all persons liable to school assessments and rates without regard to their place of residence.

4o. That inasmuch as there was proof of record establishing that the defendant belonged to the dissentient minority, and was a proprietor of land within the municipality, although not a resident therein, and that he had notified his dissent to the plaintiffs, and claimed his right to pay to the dissentient trustees—the action of the plaintiffs must be dismissed—the dissentient trustees alone being entitled to collect the amount of the school assessments and rates payable by the defendant.

Jugé :—1o. Que sous l'acte des écoles du Bas-Canada, Stat. Ref. B. C., chap 18, les dissidents ont droit de déterminer et de limiter l'application de leurs taxes et cotisations d'écoles aux écoles de leur propre persuasion; et que ce droit ne dépend pas du fait de résidence, mais est un droit personnel appartenant aux dissidents *in omni loco*.

2o. Que l'intention de la Législature en passant l'acte des écoles a été de protéger et de garantir toute croyance religieuse contre une instruction qui y repugnerait, et qu'il serait contraire à cette intention, et à la lettre et à l'esprit de la loi, de l'interpréter ou d'en faire l'application de manière à détruire cette protection et cette garantie.

3o. Que l'interprétation légale du mot *habitants* dans la 55e sec. de l'acte, n'exclut pas les personnes qui résident en dehors des limites d'une municipalité, mais qui sont propriétaires de terres en icelle, mais au contraire comprend toute personne sujette aux taxes et cotisations des écoles sans égard au lieu de leur résidence.

4o. Qu'en autant qu'il y avait preuve au dossier constatant que le défendeur appartenait à une minorité dissidente, et était propriétaire de terre dans la municipalité, quoique n'y résidant pas, et qu'il avait donné avis de sa dissidence aux demandeurs, et réclamait le droit de payer aux syndics dissidents—l'action des demandeurs devait être renvoyée—les syndics dissidents seuls ayant le droit de faire la collection des taxes et cotisations d'écoles payables par le défendeur.

Judgment rendered the 11th November, 1865.

The action was brought to recover \$16.55 for school assessments—the plea amounted to the general issue,—the facts of the case will sufficiently appear from the observations of the learned judge in rendering judgment. (1)

SICOTTE, Justice :—The liberal character of our Legisla-

(1) These observations were made by the learned Judge in french.

tion in religious matters, at all times, is a fact which cannot be questioned. By its permanence it has brought about, among the races and the different religions which exist on our soil, sentiments of confidence; a mutual spirit of respect, of good will and charity, confidence and peace. Whenever the law has to be applied in matters relating to religious liberty this constant state of things, so universal in its tendency, constitutes an important point in the consideration of the question. We have no reason to believe that the Catholic element has retrograded. Every body understands that the education of youth is of all causes the most energetic, the most active, the most penetrating and the most powerful which can influence religious ideas, as also the tendencies and habits of every day life. From thence, therefore, arise the just anxieties, the demands of each faith to have the moral and religious superintendence of its fellow-believers. Our Legislature gives each denomination the free control of its own educational matters subject to general law, which provides for civil and political order, the equality of religion and the liberty of conscience. The equality of the different religions by the law, and the absolute right inherent in each citizen to the free exercise of his faith and religion being admitted, the control of educational matters must be recognized as an essential corollary and the logical consequence of these rules of natural right. With a law based on these principles, enacted with the avowed and evident object of giving them complete and due effect, no one can refuse to admit that the way of giving such instruction should be subordinate to the principles of the law. It is proper, in this inquiry, to take into consideration the true and liberal arguments made during the hearing of the case by the learned advocate for the defence: "There is no doubt," said the Honorable Mr. Laberge, "that the intention of the Legislature was to allow each and every one to lay out his school-rate after and according to his religious opinions." In fact, whether the contributor is a resident or not, his religious belief remains unaltered, as

well as his desire to protect it, which is founded on similar reasons. What the law intended, was the prevention of all causes of irritation; that all classes should live in that confidence which is assured by religious peace; that fanatics should have no cause for agitation, and that no one should be oppressed. The Legislature seemed to understand that, although no one desires to be oppressed, it is unfortunately too true that every one wishes to be an oppressor. With a degree of wisdom which cannot be too highly praised, the Legislator aimed at giving religious intolerance no opportunity to establish itself on any occasion under the protection of municipal or civil intolerance. It would be a strange anomaly if a law led to two opposite results when applied to the same person,—that it should not protect the individual in the highest exercise of his liberty, by reason of a principle; but would only do so by reason of an accidental fact, such as his residence, and that the immunities which such law confers should be trampled upon by its own action. It would be a still greater anomaly if an order of things, consecrating the principle of the utmost liberty in education and belief, should, when applied, lead to acts of intolerance and oppression. It is indubitable that the law affirms, without subterfuge (*sans déguisement*), without obscurity, and in a way as positive as it is clear, the right of the Protestant, as well as of the Catholic, to control the use of the funds required for the maintenance of the Common Schools, and to direct by such control the education of their children. This is a personal statute elevated above, by its principles, all subtleties, such as the meaning of words, and should not be limited to any particular place. The wish of the dissentient is the measure of the exercise of his right; and is a franchise which should cover his contribution as well as his person, *in omni loco*: otherwise it would be impotent and illusory. The principle of the law, as to dissentients, is in the diversity of the religions, and not in that of places..... Whence, therefore, comes the difficulty, the doubt, in the application of the law? It is pretended that the law is

expressed in such a formal manner in the case of non-residents, that the judge has not to distinguish when the law does not distinguish, and that he cannot seek for an interpretation of the aims or intentions of the legislator, or deduce from principles, when the law contains a positive order and a formal disposition. I will not discuss what is so well understood—that the judicial power cannot intermeddle with legislation. But few cases are susceptible of a decision on the facts in litigation from the precise text of the law. It is from general principles, from doctrine, from the science of law, that we must pronounce in nearly all cases. If the science of the legislator consist in adapting the most favourable principles to the common good, the science of the judge consists in putting these principles into action, and in extending them by a wise and reasonable application to circumstances; the *rôle* of the judge is to be as liberal and more tolerant than the law; (*plus tolérant que la loi*) and his duty should never lead him to place civil intolerance in the power of fanaticism. It principally appertains to judges to show an example of the utmost deference for the sentences and the opinions pronounced by the Courts; and it is by reason of this respect for a judgment in which I cannot acquiesce, that I have thought it proper to enter into a more extended examination of the question by studying the law under all its different aspects, and in analyzing it, with impartiality, so as to understand its nature, its aims, its whole, and verify by these means its application to the case. What is important to decide is the security of each person, by putting an end to those grievous situations which, by their doubt, almost sanction ignorance and fanaticism (*qui donnent presque droit à toutes les ignorances, à tous les fanatismes*;) to settle their demands by referring to the law as interpreted and applied in the egotistical point of view of each local interest, varied as it is by the accident of catholic and protestant majorities. Here is the clause which is cited, as demanding a judgment declaring the defendant deprived of the dissentient right which he claims, and which

is refused him on the ground that he does not reside in the municipality of the plaintiffs.

"When in any Municipality, the regulations and arrangements, made by the School Commissioners for the conduct of any School, are not agreeable to any number whatever of the inhabitants professing a religious faith different from that of the majority of the inhabitants of such Municipality, the inhabitants so dissentient may collectively signify such dissent, in writing, to the Chairman of the Commissioners, and give in the names of three Trustees, chosen by them for the purposes of this Act."

Is this text so precise and so clear that its perusal alone leads to the understanding that it desired to exclude non-resident proprietors from the advantages and rights of dissentients? To understand these questions of language and signification, it may suffice to recall the two contradictory judgments which have been cited, (1) and the declaratory law submitted by government in 1868, with the assent of the Department of Education, and the opposition, offered on all points, to this interpretation, which manifested itself in judicial proceedings. When the terms of an act appear to conflict with its aim, its whole, the general spirit of legislation, the tendencies of society as well as its habits, it should not be admitted in an hostile sense to the object of the law and the opinions of all, unless the intention of the legislator is evident by the expressions which he has used, unless the order is formal and leaves the Judge no course but to apply the law. There is certainly no such precision, no such expression, no such order in the enactment on which judgment is demanded by the plaintiffs. The expression "the inhabitants" does not in parliamentary, legal or in vulgar language, imply in absolute and necessary sense, residence. It is generally used to designate proprietors. In the English Statutes and the commentaries it means the rate-

(1) The Trustees of the dissentient school of the village of St. Henry vs. Young, 13 L. C. Rep., p. 473.

payer. The Poor Law says, "overseers shall raise by taxation, of every inhabitant, and of every occupier of lands and houses in the parish." Burns in his commentaries says, "The taxation ought to be made upon the inhabitants and occupiers of lands within the parish, according to the visible estates and possessions they have within the parish." Blackstone, treating upon the same subject, thus expresses himself: "The overseers are empowered to make and levy rates, upon the several inhabitants." The statute relating to the maintenance of roads, contains the following terms: "An assessment upon all the inhabitants, owners and occupiers of land, rateable to the poor, shall be made." In these two cases the rate is imposed upon persons possessing goods subject to taxation, whether they reside or not in the place. Nevertheless, the statute designates the rate-payers by the appellation "inhabitants." Burns shows us how these words were interpreted. "Abundance of orders have been quashed, for not setting forth that the persons (who by the statute must reside in the parish) were substantial householders, and describing them only as principal inhabitants and substantial householders, without adding in the parish." This surely shows according to these judges the words "the inhabitants or householders" did not essentially imply residence.

Phillips, in his excellent work on evidence, speaking of the changes brought about by the operation of Lord Denman's Act, thus expresses himself: "Rated inhabitants were before that Act incompetent witnesses." This incompetency applied to all rate-payers, whether they resided or not in the parish. Therefore, according to the Parliamentary language of England, the words "the inhabitants" referred to a rateable property, a rateable and a rated inhabitant, without regard to residence. The edict of 1679, which regulated in Lower Canada the obligations of parishioners with respect to the erection of churches, ordered that they should be built at the expense of the inhabitants. Several ordinances have been published, and

several judgments have been delivered since 1790, in which the proprietors in a parish, residents or not, are condemned to contribute for the construction of the churches, and are called "the inhabitants." In the Municipal Law of 1841, the electors are designated in the English text "the inhabitant householders," which has been translated "*les habitants tenant feu et lieu*," The statute of 1845, which reformed the District Councils by Municipal parishes, in designating the electors indicates them as follows: "the said inhabitants being inhabitants *tenant feu et lieu*."

In Upper Canada the statute gives the right of voting at the first election in a municipality "to every resident male inhabitant of sufficient property," and at subsequent elections "to every male freeholder" whose name appears on the assessment roll. It would be useless to cite any further texts to show that the words "the inhabitants" have not in our Parliamentary language an absolute sense of residence; otherwise the Legislature would never have said, as we have seen, "the said inhabitants being inhabitants *tenant feu et lieu*." These words indicate the universality of the interested parties constituting the municipality with and by its proprietors. In a community calculations are only based on its taxable value. The assessment roll is the sole legal record in which you may read and learn the names of the inhabitants. In the works of the best authors the words inhabitants or proprietors are indifferently held to qualify or designate the interested parties in referring to the properties which they possess. Denisart tells us that: "When the inhabitants of a parish are at law in matters of real estate, they comprise the proprietors of lands situated in the parish in such a way that although these proprietors reside elsewhere, they are on such occasions held to form part of the number of the inhabitants." Cyrasson, in his treatise on possessory actions, expresses himself as follows: "The inhabitants have a right to enjoy all the advantages and conveniences which are bestowed by a street;" and then, refuting Pardessus,

adds: "He allows that the proprietor should be indemnified if deprived by the municipality." In a judgment which he quotes, allowing damages for a change in the grade of a street, we find the motive in the following terms: "Seeing that among the charges which each inhabitant has to meet, the damages which a citizen's property may receive cannot be enumerated." So much for the Parliamentary and legal sense of the words.

The dictionary says a "rich inhabitant" applies to people generally, and that a well-to-do "inhabitant" indicates a proprietor in easy circumstances, or wealthy farmer, without any reserve as to his special residence. But the statute even in this case interprets the words in the sense which they should carry. The 34th clause orders that there shall be a meeting of the proprietors of land and of inhabitants *tenant feu et lieu*—"landholders and householders"—for the purpose of electing Commissioners. To be an elector a person must be a proprietor in the Municipality. Residence is not necessary in a municipal election to give the right of voting; it is not required either for the political vote, and it is, doubtless, by reason of the universality of interest which relates to public education that both franchises have been placed on the same footing. The proprietor, although he does not reside, forms part of the municipal body to which appertains the administration of the common interest. He is by the law itself held to form part of the number of inhabitants. He has the right to be notified, and the right of action in the organization of the Executive Council of the community. Thence flow his immunities, which are those of the other rate payers; he cannot form part of the body politic and still only possess the right of paying. It is by reason of his contribution that he forms part of the community, and the least that he can possess is the right to control its use and destination. It is no longer a local, partial and exclusive right, but a public and general one, interesting all society in the same degree. When local improvements of a material nature are in question, this

contribution can be laid out in what the majority may deem to be the most advantageous way ; for then the non-resident proprietor participates in the improvement. But we cannot reason in this way when conscience is in question, and things relating to morals and religion. There is no longer any confusion between a thing belonging to all and to each, but nothing is settled or determined by the principle of majorities ; in a religious point of view a person owns himself entirely : otherwise it is but liberty of thought and education, exercised at the will of the majority. In these divergences of opinion, more or less egotistical, people seem to have lost sight of the object which Parliament had in view by the terms in question. In order that there should be a corporation of dissentients in a municipality, it follows that there should be in the municipality itself a number of inhabitants to organize and carry out the functions of such a corporation. But once such a body is constituted the law makes no further distinction ; it declares that the council of dissentients will have the sole right to assess and levy the school rates from the dissentients. Religious faith alone limits and designates those who may belong to such corporation ; in fact, it is but logical and impartial that a separation of the majority and minority should take place on the simple demand of the latter. Ere resuming this argument, I believe it my duty to say that if any person does not concur in the opinions which I have just enunciated, they cannot, nevertheless, deny that the language of the law, as to the conditions of the right of dissidence, is at least susceptible of the interpretation which I have given it. This admitted, we revert to the science of law. The general rules which the wisdom of enlightened men of all ages have taught us for the explanation of laws should be studied, in order to guide the opinions of judges. As Dwaris remarks : " The duty of the judges in the interpretation of the law, if difficulties occur, is to look to the spirit and object, and to be guided by rules and examples." Several of these rules have already been elucidated ; it will suffice to recall and apply a few

others. "It is not the words of the law," says ancient Plowden, "but the internal sense of it, that makes the law. The letter of the law is the body, the sense and reason of the law, is the soul."

It is worthy of remark that our legislature, in material points, transcribed these words almost literally by enacting that generally all words, expressions and dispositions should receive as large, as liberal, as broad, and as advantageous an interpretation as was necessary, in order to reach the objects contemplated by its acts, and to put in force all its different provisions according to its true sense, intent and meaning. In form the intention of the legislature is not doubtful; it is even admitted in a sense favorable to the dissidence of the non-resident. And here is how the judicious Dwaris resumes the teaching and the jurisprudence of England: "The real intention, when collected with certainty will always, in statutes, prevail over the literal sense of the terms. A thing which is within the object, spirit and meaning of a statute is as much within the statute as if it were within the letter." The dissidence of the catholic or protestant non-resident "is within the object, spirit and meaning of the statute." A jurisconsult, whose opinions should have the greatest weight, but principally in the study of the rules which should be followed in the interpretation of the laws,—the learned Domat—taught that it was by the spirit and intent of the law that they should be heard and applied. To judge properly of the sense of a law we should, he said, consider what is its motive, what were its inconveniences and its utility. Thence it followed that if some of the terms or some of the expressions of a law appeared to have a different meaning from those which were evidently fixed by the tenor of the law in its entirety, we should seize these latter and reject the others which were in the terms, but contrary to the true intention of the law.

With the liberty of creeds and their equality before the

law, the rights of the minority are as absolute as those of the majority. The true intent of the law seems to be the equal protection of these rights; the other sense the law is capable of, must be rejected wherever it seems contrary to its real object, although it is evidently couched in much the same terms. An important observation on this part of the subject would be omitted if we did not recall what was so often shown by the most eminent magistrates of France and England. When it is proposed to set aside the principles of eternal justice, or to elude fundamental rules, the law expressing the intention of the legislator must be expressed with irresistible clearness to induce the tribunals to suppose that he really has the intention to effect such a result. The present organisation was established for the purpose of guaranteeing catholics as well as protestants from the fear and possibility of seeing their contributions employed in propagating doctrines which they hold in repugnance. The law would destroy itself if, by its application under any circumstances whatever, it did away with this guarantee. The reasons of inconvenience urged by the plaintiffs in support of their pretensions cannot be supported, inasmuch as their system does not provide any remedy, can only tend to hinder public education, and would inaugurate everywhere the provocative policy which the legislature has endeavored to prevent. It would be as just in Canada as it is in England, to say with Baron Parke: "We must always construe an act so as to suppress the mischief and advance the remedy according to the true intent of the makers of the law."

The examination which I have made into this subject, leads me to believe that it is demonstrable to evidence that the right of the rate-payer to superintend the employment of his rate in public education is the corollary of his right to the exercise of his religion and of his faith; and that the law examined as to its object in its whole, and in its details, has consecrated a principle so just and necessary to peace, in a country where races find shelter in their

contrast, and religions protect one another by their diversities.

It also seems to be demonstrated that a strictly legal interpretation of the text of the law, followed in its parliamentary as well as in its usual and legal sense, cannot allow or admit an exception to this right, which flows from our civil and political constitution as well as from the natural law.

The judgment is as follows :

Considérant que la loi sur les écoles communes, conserve le droit des minorités dissidentes en matière religieuse, d'avec la majorité des habitants dans toute municipalité scolaire, de contester l'application de leurs contributions, à raison de leur dissidence : Considérant que ce droit est fondé sur la différence des religions, et non sur la diversité des lieux, et que c'est un droit personnel qui doit couvrir le contribuable *in omni loco* :

Considérant qu'il est constant que l'intention du législateur était de permettre à tout habitant du Bas-Canada, de protéger ses croyances religieuses contre un enseignement public qui lui répugnerait ; et qu'il serait contraire à cette intention, comme à l'esprit et à la lettre de la loi, d'en faire une application, qui dans aucune circonstance pourrait détruire cette garantie :

Considérant que les termes de la loi qui déterminent le droit de dissidence doivent évidemment comprendre tous les contribuables, sans condition et réserve de résidence :

Considérant qu'il est admis par les déclarations faites à l'audience, que dans la municipalité des demandeurs, il y a une corporation de dissidents, et que le défendeur est un des contribuables comme propriétaire dans la municipalité, quoiqu'il n'y soit pas résident : Considérant qu'il est également admis que le défendeur appartient par sa croyance religieuse à la minorité dissidente, et qu'il a fait connaître

sa dissidence aux demandeurs, et réclamé le droit de payer ses taxes scolaires aux syndics des dissidents :

Considérant qu'à raison de ces faits, les syndics des dissidents ont seuls le droit de réclamer du défendeur le paiement de sa contribution scolaire :

Considérant que par le fait de la dissidence du défendeur et de l'existence d'une corporation de dissidents dans la municipalité, les demandeurs n'ont aucune réclamation pour les fins scolaires contre le défendeur, et que ce dernier ne leur doit pas de taxes scolaires :

La Cour déclare les demandeurs non-recevables dans leur demande, et les en déboute avec dépens.

HUNGERFORD, for plaintiffs.

LABERGE, Q. C., for defendant.

BANC DE LA REINE, } DISTRICT DE QUEBEC.
EN APPEL.

Présents :—DUVAL, Juge-en-Chef, AYLWIN, MEREDITH, DRUMMOND et MONDELET, Juges.

VENNER..... *Appelant.*

et

LE SOLLICITEUR-GÉNÉRAL, *pro* REGINA..... *Intimé.*

Jugé :—1o. Que d'après les dispositions de la 9e Vic., cap. 62, sec. 18, la Reine a une hypothèque sur les biens de la caution d'un emprunteur de sommes sur le fonds réservé pour prêt aux incendiés de 1845, et qu'il n'était pas nécessaire que cette hypothèque eut été enregistrée.

2o. Que cette hypothèque quoique non enregistrée prime toutes celles enregistrées subséquemment à la date de tel prêt.

Held :—1o. That under the provisions of the 9th Vic., cap. 62, sec. 18, Her Majesty has a mortgage upon the immovables of the surety of a borrower of moneys upon the fund reserved for a loan to the sufferers by the fires of 1845, and that it is not necessary that such mortgage should be registered.

2o. That such mortgage although not registered takes priority of all those registered subsequently to the date of such loan.

Jugement rendu le 19 mars, 1866.

La cause dans laquelle a originé cette contestation avait été portée, dans la Cour de Circuit de Québec, par dame

Julia Smith, contre Philippe Marcoux. Sur cette poursuite, un bref de *feri facias* émana de la dite Cour contre les immeubles du défendeur qui furent vendus. Une opposition afin de conserver fut produite par notre souveraine dame la Reine, réclamant une balance due sur un prêt fait à un nommé Michel Girard, aux termes des statuts du Bas-Canada, 9 Vic., chap. 62, et 10 et 11 Vic., chap. 35. Cette opposition alléguait que Michel Girard avait consenti, pour le prêt en question, une obligation notariée en date du 2 mai, 1848, qu'il avait droit d'obtenir ce prêt aux termes des statuts susdits, que le défendeur, Philippe Marcoux, propriétaire de l'immeuble vendu par décret, avait comparu à l'acte comme caution solidaire de l'emprunteur, et qu'il avait hypothéqué spécialement pour sûreté de son cautionnement l'immeuble en question. L'acte d'obligation contenant ce cautionnement n'avait pas été enregistré. Sa Majesté la Reine ayant été colloquée par le projet de distribution pour la balance de sa créance en vertu de l'hypothèque constituée par la caution, l'appelant, créancier subséquent, mais dont l'hypothèque avait été enregistrée, contesta l'ordre et prétendit que le défaut d'enregistrement de l'hypothèque devait donner priorité à la sienne, qui avait été dûment enregistrée.

La Cour inférieure, par jugement rendu le 9 octobre, 1865, déclara cette prétention mal fondée en loi, et débouta la contestation de l'appelant. Ce jugement était la matière de l'appel.

FOURNIER, pour l'appelant:—Le certificat du registraire ne fait mention d'aucune hypothèque en faveur de la Couronne. L'appelant maintient donc que la dispense de la nécessité de l'enregistrement ne peut s'étendre aux termes de la 18e clause du chap. 62 de la 9e Vic., qu'aux hypothèques consenties par les emprunteurs au fonds des incendiés de Quebec. Cette disposition, contraire à notre ordonnance d'enregistrement, qui oblige Sa Majesté aussi bien que ses sujets, à enregistrer ses titres de créances, doit

être interprétée d'une manière rigoureuse, et la Cour ne peut donner aux termes de cette disposition plus d'extension qu'elle n'en comporte. Il était toujours facile pour un créancier de constater si la propriété sur laquelle il désirait prendre une hypothèque était une de celles détruites par l'incendie de 1845, mais comment, sans enregistrement, pouvait-on connaître les cautions que les commissaires du prêt auraient pu exiger. Les mots *droits, privilèges et hypothèques ci-dessus mentionnés* ne peuvent donc que se rattacher et s'appliquer aux droits, privilèges et hypothèques consentis par l'incendie. Les dispositions de tout le chapitre déjà cité ne parlent que de cela, et si la Couronne voulait exiger des cautions, elle devait prendre l'inscription sur leurs biens. L'hypothèque s'étend par le statut sur tous les biens de l'emprunteur. Il n'y a pas besoin de spécialité, ainsi si l'on donnait à la disposition, dispensant de la nécessité de l'enregistrement, l'interprétation que lui a donnée la Cour Inférieure, on pourrait également dire que l'hypothèque s'étend sur tous les biens de la caution sans nécessité de désigner spécialement aucun immeuble.

Le procureur de l'intimé prétendit que la loi étant explicite, il fallait lui donner son entière application.

DUVAL, Juge-en-Chef:—La loi dit en termes formels que l'enregistrement ne sera pas nécessaire pour assurer la validité de l'hypothèque consentie par les emprunteurs du fonds de prêt en question, il devient donc nécessaire de l'appliquer quelles qu'en soient les conséquences. La Cour est de plus d'opinion, que cette disposition de la loi sur laquelle la cause est fondée, s'applique aussi bien à la caution de l'emprunteur, qu'à l'emprunteur lui-même. La Cour confirme donc le jugement rendu en Cour Inférieure, rejetant la contestation de l'opposant Verner.

FOURNIER et GLEASON, pour l'appelant.

CASALT, LANGLOIS et ANGERS, pour l'intimé.

QUEEN'S BENCH, } DISTRICT OF MONTREAL.
APPEAL SIDE.

Before :—AYLWIN, MEREDITH, DRUMMOND and MONDELET, Justices.

THE GRAND TRUNK RAILWAY COMPANY.....*Appellants.*
and
CUNNINGHAM*Respondent.*

Held :—At the trial by jury.—10. That the purchase of a return ticket having upon it the words, "Good for day of date, and following day only," is a valid, legal contract, and may be enforced.

20. That if the jury found that the conductor on the train allowed other passengers on the occasion in question to pass on spent return tickets, or that this was the usual practice of the Railway Company, then the plaintiff was entitled to the same treatment, and was not obliged to pay for his return passage, and should obtain a verdict in his favor.

By the Court on motion for a new trial, and a motion for judgment.—10. That a passenger having a spent return ticket, and offering the same to the conductor, when asked for his fare, cannot from that circumstance alone, be held to have "refused" to pay his fare.

20. That the jury being masters of the facts, and having found a general verdict for \$100, the Court did not feel justified in ordering a new trial.

30. That a conductor who keeps the return ticket handed to him by such passenger, is not justified by law in so doing, and insisting on full return fare being paid.

In appeal :—10. As first held at the trial by jury.

20. That the judge should have directed the jury that a special and valid contract existed, and that the ticket was spent and useless, and that the plaintiff was properly ejected from the car.

30. That there was no sufficient proof of the alleged practice of the company allowing passengers to use spent return tickets, and that repeated instances being proved of conductors allowing this to be done, could not bind the company, the practice being in contravention of orders.

Jugé :—Sur le procès par jury.—10. Que l'achat d'un billet de retour portant les mots : "Bon pour le jour de date et le jour suivant seulement," est un contrat valide et légal, dont on peut contraindre l'exécution.

20. Que si le jury constatait que le conducteur du train avait laissé passer dans la même occasion d'autres passagers portant des billets échus, ou que telle était la pratique ordinaire de la compagnie, le demandeur, dans ce cas, avait droit au même avantage, et n'était pas obligé de payer son voyage de retour, et devait obtenir un verdict en sa faveur.

Par la Cour sur motion pour un nouveau procès, et motion pour jugement.—

10. Qu'un passager porteur d'un billet échu et l'offrant au conducteur, sur demande de paiement de son passage, ne peut pas par cela seul être réputé avoir "refusé" de payer le prix de son passage.

20. Que le jury étant juge des faits, et ayant rapporté un verdict pour la somme de \$100, la Cour ne pouvait pas accorder un nouveau procès.

30. Qu'un conducteur n'a pas le droit de garder le billet de retour offert en paiement par un passager, tout en exigeant de lui l'entier paiement de son passage.

En appel :—10. De même que précédemment jugé lors du procès par jury.

20. Que le juge aurait dû déclarer au jury qu'il y avait un contrat spécial, et que le billet était échu et avait cessé d'être valable, et que c'était avec raison que l'on avait expulsé le demandeur des cars.

30. Qu'il n'y avait pas preuve suffisante que la compagnie fut dans l'habitude de recevoir comme bons les billets de retour échus, et que quoiqu'il fut prouvé que dans plusieurs cas les conducteurs avaient reçu ces billets, ces faits ne pouvaient pas lier la compagnie, cette conduite étant contraire aux ordres donnés.

Judgment rendered the 9th December, 1865.

The action was brought to recover \$306 for damages.

alleged to have been suffered by the respondent by reason of his having been forcibly and violently expelled from a railway carriage of the appellants on their road, when returning from Montreal to Acton Vale, on the 8th November, 1861, without giving him time to take with him certain papers and effects of great value, notwithstanding his purchase at Acton Vale of a first class ticket to go to Montreal and return, known as a return ticket. This ticket had upon it "good for day of date and following day only," and indorsed November 6, 1861. The plea was to the effect, that the ticket was good only for the day of its date and the next day; that on the 8th November, the plaintiff when asked for his ticket insisted that he had a right to return without further payment, that the conductor on the train after telling him that he had orders not to allow return tickets to be made use of after the expiry of the two days, and asking for payment of the usual fare gave him notice that he, the respondent, must leave the carriage at the next station. That the respondent left the train at Charron's about 6 miles from Montreal without violence on the part of the conductor, and under reserve of his rights.

At the trial, the presiding judge charged the jury to the effect that the condition on the ticket was a valid and legal contract which might be enforced by the company, but that if the conductor on the same train allowed other passengers to pass on return tickets which had expired, or if this was the usual practice of the company, then the respondent was entitled to receive the same treatment, and was not obliged to pay his passage from Montreal, and that if the jury found these facts proved, the respondent was entitled to a verdict. The defendants filed an exception to this ruling. The jury by consent of parties found a general verdict. Damages \$100.

On the 24th November, 1864, the plaintiff moved for judgment on the verdict, and the defendants moved for a new trial before BERTHELOT, Justice.

At the argument it was contended on behalf of the company:

1° That the charge of the presiding judge was erroneous in law, and that he should have directed the jury to find a special contract, and that the ticket was expired or spent, and was useless.

2° That no damage was suffered or proved, and that there was no evidence of mis-conduct on the part of the conductor, who had merely acted in accordance with his instructions.

3° That the condition printed on the ticket was lawful. (1)

That when a person was travelling without a proper ticket, and refused to pay fare, he might be put off from the railway cars. (2)

4° That the proof made by the plaintiff of conductors having occasionally passed passengers with spent tickets was useless. The proof of usage could not avail the plaintiff; no such proof, no parol proof could override the express contract here. (3)

PERKINS, for the plaintiff submitted :

1° That the company could only charge 2d. per mile travelled, and that as a corporation, by law and the statute, no undue preference could be given to one person over another. (4)

(1) *Hawcroft vs. G. Northern R. Co.*, 8 Eng. L. and Equ. Reports, p. 362, Boston edition :—*Romsey vs. N. E. R. Co.*, June, 1863, (such a condition held to derogate from Statute right). In New York, per Marvin, J., in 1860, *Barker vs. Coffin*:—in Massachusetts, 1st Allen's Rep., 267 :—In Lower Canada, Pothier, Oblig., Nos. 130, 136, 146.

(2) Cons. Stat. Canada, ch. 66; and see *Regina vs. Faneuf*, 5 L. C. Jurist, p. 167.

(3) 1st Greenleaf's Evidence, p. 336, and note 2 :—*Parsons on Contracts*, pp. 53, 56, 57, 59.

(4) Stat. of Canada, 1851, Incorp. G. T. R. R. Co., 14 et 15 Vic., Cap. 73 :—Cons. Stat. of Canada, ch. 66, Sec. 25.

2° That the condition attached to the ticket was illegal, and in any event not proved legal. (1)

3° That usage and custom as pleaded was well proven, and the law presumed the plaintiff to have purchased his ticket in reference to the custom extant, and that custom and usage explained the contract, the condition of which the company had always waived. (2)

4° That the verdict as to damage being so small, ought not to be disturbed. (3)

BERTHELOT, Justice.—After recapitulating the pleadings, evidence and verdict, stated, in effect, that there was clear evidence that the conductor had kept the return ticket and refused to return it; in this he was not justified by law; there was evidence also that the rule as to not allowing passengers to return on spent tickets was not strictly adhered to. He had no doubt the company had a right to put off the train persons who refused to pay their fare, but he did not think a refusal had been proved in this case. There was a dispute as to the mode of payment, but not a direct refusal. The conductor had gone beyond his duty in keeping the ticket and in demanding the full fare, and this ought not to be overlooked.

He held the verdict of \$100 to be moderate, it was based upon facts found by the jury, who were the masters of the facts, and therefore, he would refuse the motion for a new trial, and grant the motion for judgment on the verdict.

(1) Cons. Stat. of Canada, ch. 66, sec. 151.

(2) Grant on Corporations, Custom, Secs. 320, 321, 322 :—22 Barbour's Repts., p. 130, Northern R. R. Co. vs. Paige :—24 Id., p. 514, Pier vs. Finch, *et al.* :—25 Wendell, 419 :—9 Pickering, 338 :—Curtis' Digest Supreme Court U. S., p. 578, Usage :—2 Parsons on Contracts, pp. 48 to 59; of the effect of Customs or Usages :—7 Ellis and Blackburn, 278-79.

(3) 8 U. C. Law Repts., No. 7, July, 1862, Curtis vs. G. T. R. R. Co. (\$300 damages) :—Addison on Contracts, Ed. 1857, p. 509 :—3 Barn. and Ald., p. 728, Smith and Wilson, Remarks of Baron Parke :—2 Hiliard on Torts, pp. 546, 576, 577, Nos. 21, 24, 26 :—Index to Eng. Com. Law Reports, New Trial.

Judgment accordingly :—It was from this judgment that an appeal was instituted.

DRUMMOND, Justice :—After recapitulating the pleadings and proof stated that a new trial must be granted. The contract as to the return ticket was a valid, binding contract, and ought to be enforced. The Court was unanimous as to this. It was said there were no notices posted in the cars as to enforcing the company's rules, but no such notices were necessary. If a man voluntarily makes a contract, he requires no notice in order to bind him to perform it. The plaintiff was not sustained in his allegation of violence on the part of the conductor, and it was proved that the conductor carried out the company's instructions on the very train in question. But even if the conductor had acted otherwise, and allowed passengers to use spent return tickets ten times or oftener, that could not relieve the plaintiff from his contract. He was bound to return within the time agreed on, or lose the benefit of his ticket, and could not be relieved from this by the neglect, on the part of conductors, to obey the instructions of the company. Even if such neglect were proved, which was not the case here.

It appeared to him there must be some strong prejudice against railway corporations or against the appellants, if such verdicts were given, merely because the company wished to carry out a valid, legal contract in a legal manner.

MONDELET, Justice :—Could not acquiesce in the pretension that if the company had allowed certain persons to pass on spent return tickets, therefore, all persons had a right to pass with such tickets.

MEREDITH, Justice :—The evidence instead of establishing a usage as to return tickets establishes an abuse. But an occasional neglect of duty on the part of a conductor cannot set aside a contract. The Judge ought to have charged the jury that such contract existed, and that the

plaintiff had no right to return on the 8th after the expiry of the delay. ' 1

Judgment in appeal:

Seeing that the verdict of the jury entered against the appellants was contrary to evidence : Seeing that the presiding Judge at the time of the trial should have directed the jury to find a special contract under which the ticket given to the respondent by the appellants was to be " Good " for day of date and following day only," and was purchased on the 6th day of November, 1861, and that the respondent presented his return ticket to the conductor after the period of time elapsed, to wit, on the 8th day of the same month, and that the ticket was spent and useless, and that the respondent was properly ejected from the cars of the appellants, and that the charge of the said learned judge was erroneous in law.

Seeing, therefore, that in the judgment appealed from there is error, it is considered that the said judgment, to wit, &c., be reversed ; and proceeding to render the judgment which the Court below ought to have rendered, it is ordered that the said verdict be set aside and that a new trial be awarded, with costs of both Courts.

CARTIER & POMINVILLE, for appellants.

McKAY, Counsel.

PERKINS & STEPHENS, for respondent.

DORION, V. P. W., Counsel.

COUR SUPÉRIEURE.—QUÉBEC.

Présent :—STUART, Juge.

No. 2152 { BLOUIN.....*Appelant.*
 et
 ARMSTRONG.....*Intimé.*

Jugé :—1o. Qu'il ne suffit pas que l'avis de la part du capitaine d'un vaisseau, requis par la 12 Vic., Cap. 144, Sec. 76, relatif aux lois de la Maison de la Trinité de Québec, pour la poursuite du pilote accusé de négligence grossière pendant qu'il était en charge de tel vaisseau, soit envoyé au maître du havre dans les quatre jours ensuivant l'arrivée du vaisseau dans le port ; mais qu'il faut de plus que cet avis parvienne à sa destination dans ce délai.

2o. Que preuve doit être faite dans la cause que cet avis a été donné et qu'il a été reçu dans ce délai.

3o. Que, dans l'espèce, l'avis donné n'était pas suffisant, parce qu'il ne comportait pas plainte contre le pilote.

Held :—1o. That it is not sufficient that the notice on the part of the captain of a vessel required by the 12 Vict., Cap. 144, Sect. 76, relative to the laws of the Trinity House of Quebec, for the prosecution of pilots accused of gross negligence while in charge of such vessel, should be sent to the harbour master, within the four days next after the arrival of such vessel in port ; but such notice must also reach the harbour master within that delay.

2o. That proof must be given in the cause that such notice was given and that it was received within the delay fixed.

3o. That, in the case submitted, the notice given was insufficient, inasmuch as it contained no complaint against the pilot.

Jugement rendu le 9 avril, 1866.

L'appelant, pilote licencié pour le havre de Québec et au dessous, avait été condamné par la Maison de la Trinité à la suspension de sa licence de pilote pendant un an, pour avoir échoué le vaisseau *Chillianwallah*, pendant qu'il en avait la charge.

En Cour Supérieure, l'appelant plaida manque de l'avis requis par la loi, et soutint que la lettre suivante ne pouvait former une plainte suffisante pour donner lieu à la poursuite contre l'appelant. Cette lettre, adressée par le maître du vaisseau au maître du havre, était ainsi conçue :

" The pilot of the *Chillianwallah*, which sailed from the port, the 31st October, got her on shore on the East End

of Bic Island, on the South East reef, on Thursday morning, 9th instant, about 3 o'clock.

(Signed,) Edward O'Flaherty,
Master."

Quand bien même, disait l'appelant, cette lettre serait un avis suffisant et constituerait une plainte contre le pilote, le jugement devrait également être renversé, parcequ'il n'y avait dans la cause aucune preuve que cet avis eut été reçu par le maître du hâvre dans les quatre jours ensuivant l'arrivée du vaisseau dans le port, ce qui devait être fait d'après les dispositions de la 66me section du statut relatif à la maison de la Trinité de Québec, qui dit :

" And be it enacted : That the master of any vessel, believing that he has ground of complaint against his Pilot for bad conduct during the upward and downward passage of such vessel, shall, on pain of losing all right of complaint, inform the Harbour Master thereof *within four days* after his arrival in the harbour of Quebec."

La Cour en rendant le jugement suivant, décida ces différents points suivant les prétentions de l'appelant.

The Court having seen and examined the proceedings of record, as well those had before this Court, as those had before the Trinity House of Quebec, in the present cause, &c.

Considering that there is error in the judgment appealed from, to wit, the judgment rendered by the Trinity House of Quebec, on the first day of December, one thousand eight hundred and sixty-five, against the said Paul Blouin, suspending him from his duties of pilot for twelve calendar months from the sixteenth day of the said month of December, and that there is no evidence of mis-conduct

or gross negligence in the said Paul Blouin, while in charge, as pilot, of the ship *Chillianwallah*; and moreover that there was no complaint in legal form before the said Trinity House as required by law, the Court doth reverse, annul and set aside the said judgment, with costs in favor of the said Paul Blouin, and against the respondent.

CARON et DUVAL, pour l'appelant.

ALLEYN et ALLEYN, pour l'intimé.

COUR SUPÉRIEURE.—QUÉBEC.

Présent:—TASCHEREAU, Juge.

No. 1552. { *Ex parte* GEORGE VAILLANCOURT....*Requérant*
pour *bref de Certiorari.*
et
LE CONSEIL MUNICIPAL DE LA PAROISSE
DE ST. ROCH DE QUÉBEC SUD...*Demanderesse*
en *Cour Inférieure.*

Jugé:—1o. Qu'une poursuite en vertu du chap. 6, Stat. Ref. du Bas-Canada, pour vente de liqueurs spiritueuses sans licence, peut-être instituée au nom d'un Conseil Municipal, et que tel conseil a qualité pour poursuivre en vertu de la 24 Victoria, chap. 29, sec. 4, sous-sec. 20.

20. Qu'une conviction rendue sous l'autorité du dit acte par un Juge des Sessions de la Paix, ne peut être portée devant la Cour Supérieure par certiorari.

Held:—10. That a prosecution in virtue of the Cons. Stat. for L. C., cap. 6, for selling spirituous liquors without a license, may be brought in the name of a Municipal Council, and that such council is qualified to prosecute in virtue of the 24th Vict., cap. 29, sect. 4, sub-sect. 20.

20. That a conviction under the authority of the said act by a Judge of the Sessions of the Peace, cannot be brought before the Superior Court by *certiorari*.

Jugement rendu le 19 janvier, 1866.

La poursuite en la cause avait été instituée en vertu du chap. 6 des Stat. Ref. du Bas-Canada contre le défendeur Vaillancourt, pour avoir vendu en détail des liqueurs spiritueuses sans la licence requise par la loi, par devant le Juge des Sessions de la Paix, et jugement avait été rendu contre le requérant, le condamnant à la pénalité imposée par le dit statut. La plainte contre le défendeur était conçue en ces termes :

The Municipal Council of the south part of the parish of St. Roch of Quebec, said part being and constituting the municipality of the parish of St. Roch of Quebec South, in the district of Quebec, on behalf of Our Sovereign Lady the Queen, prosecutes George Vaillancourt of the said parish, in the said district of Quebec, trader.

For that whereas the said George Vaillancourt did, at the parish aforesaid, in the district aforesaid, to wit, in the house and premises there situate of him the said George Vaillancourt, within the limits of the said municipality of the parish of St. Roch of Quebec South, on the eighteenth day of June, in the year aforesaid, and at sundry times before and since, sell by retail in quantities less than three gallons at a time, certain spirituous liquors, to wit : Gin, without the license required by the provisions of the statute in such case made and provided, contrary to the said statute. Whereby and by force of the said statute the said George Vaillancourt hath become liable to pay the sum of fifty dollars currency.

Wherefore the said Municipal Council prays judgment in the premises, and that the said George Vaillancourt may be condemned to pay the said sum of fifty dollars currency, for the said offence, and costs.

Le 19e jour de juillet, 1865, le dit Juge des Sessions de la Paix rendit jugement, maintenant la dite plainte.

Le défendeur présenta une requête à la Cour Supérieure pour le district de Québec, le 4 d'octobre, 1865, pour l'obtention d'un bref de *certiorari* contre cette conviction, laquelle requête contenait entr'autres les raisons suivantes, savoir :

1° Parceque par la dite plainte ou information il n'y a aucune offense distincte alléguée avoir été commise par le requérant.

2° Parceque la dite plainte ou information n'allègue

pas quand a été commise la prétendue offense imputée au dit requérant.

3° Parceque le jugement rendu contre le dit requérant n'est pas conforme à la plainte ou information.

4° Parceque la dite plainte ou information ne spécifie pas d'une manière certaine et positive la quantité de boisson vendue par le dit requérant, et ne contient aucune charge suffisante en loi pour justifier le jugement rendu contre le dit requérant.

5° Parceque la plainte ou information est faite au nom du Conseil Municipal de la partie sud de la paroisse de St. Roch de Québec, et qu'en loi le dit Conseil Municipal est et était inhabile à faire la dite plainte ou information.

6° Parceque la dite conviction n'a pas été rendue avec justice et équité, et est contraire à la loi, et que le dit Juge des Sessions de la Paix n'avait aucune juridiction en la dite cause.

La dite requête fut le même jour accordée, et l'émanation du bref de *certiorari* permise, et la cause ayant été subséquemment inscrite pour audition, la conviction fut maintenue avec dépens.

TASCHEREAU, Juge :—Un bref de *certiorari* a été émané en cette cause contre un jugement rendu par le Juge des Sessions de la Paix, à Québec, le 19 de juillet dernier, sur requête du nommé George Vaillancourt, qui prétend avoir été lésé par ce jugement. De la part du requérant il a été prétendu que la plainte ou déclaration n'avait pas été signée par le plaignant, mais par ses procureurs *ad litem*, et qu'elle était défectueuse et non conforme à la loi; que la plainte ne mentionnait pas quand l'offense avait été commise; que la plainte n'était pas datée; que la quantité de boisson vendue n'était pas énoncée d'une manière suffisamment claire pour lui permettre de se défendre de l'ac-

cusation portée contre lui ; que la corporation de la dite municipalité seule, sous son nom collectif, avait le droit de poursuivre, et enfin le défaut de juridiction de la Cour Inférieure, attendu que rien ne constatait que la procédure avait été prise dans les six mois à compter de la commission de l'offense.

De la part de la défense, on a prétendu que la conviction était conforme à la loi et à la preuve, et qu'on ne pouvait pas attaquer cette conviction au moyen d'un bref de *certiorari*, et que la loi contenait une disposition expresse à cette égard. Des prétentions du requérant, les seules qui me paraissent sérieuses et propres à annuler le jugement de la Cour Inférieure, s'il y avait lieu, sont le défaut de date dans la plainte pour établir quand l'offense imputée au requérant aurait été commise, et l'omission de la date au bas de la plainte, de manière qu'il est impossible de dire si la poursuite a été faite dans les six mois à compter de la date de la commission de l'offense, laissant planer le doute sur la juridiction du tribunal inférieure, et j'aurais été disposé à maintenir le *certiorari* pour ces raisons, mais devant cette clause du statut qui enlève le droit d'évocation par *certiorari* à la Cour Supérieure, je dois me conformer à la lettre de la loi.

Quant à la question de savoir si un conseil municipal a droit de poursuivre une offense de cette nature devant les tribunaux, j'ai déjà décidé qu'un conseil municipal avait ce droit, et je suis encore de la même opinion. La 24 Vic., chap. 29, lui donne ce droit en termes clairs et précis, au reste la preuve offerte en Cour Inférieure établit d'une manière à n'en pas douter que le défendeur, présent requérant, s'est rendu coupable de l'offense dont il est accusé, et je dois en conséquence renvoyer le *certiorari* et permettre l'exécution du jugement de la Cour Inférieure.

SUZOR, pour Vaillancourt.

ANDREWS & ANDREWS, pour le Conseil Municipal.

SUPERIOR COURT.—QUEBEC.

IN REVIEW.

Before:—BADGLEY, STUART and TASCHEREAU, Justices.

MOFFETTE.....Plaintiff.

VS.

THE GRAND TRUNK RAILWAY COMPANY OF
CANADA.....Defendants.

Held:—1o. That a party suing in damages resulting from imputed culpable fault or negligence on the part of the defendant, must himself be without any misconduct or fault and have used ordinary care; and that where an injury has resulted from the negligence of both parties, more especially if without any wilful or intentional wrong on the part of either, an action will not lie.

2o. That to sustain an action in damages resulting from negligence on the part of the defendant, the burden of proof to shew such wilful negligence, or otherwise, by the defendant, is on the plaintiff, who is further bound to shew ordinary care by himself, or, that if he himself did not exercise ordinary care, this did not contribute to the alleged injury.

3o. That there must be affirmative proof of due care at the time of the accident.

4o. That when damage is done by a party, in the exercise of his lawful rights, the plaintiff must prove that the loss occurred without his fault, and by the neglect of the defendant.

5o. That though the defendant is guilty of gross negligence, causing damage to the plaintiff, yet where the plaintiff was guilty of want of ordinary care, contributing essentially to the injury, he cannot recover.

Jugé:—1o. Qu'il faut que celui qui réclame des dommages causés par la faute grossière ou par la négligence du défendeur soit lui-même à l'abri d'une imputation de négligence ou manque de soin ordinaire; et que dans le cas où le tort serait le résultat d'une faute commune, et plus particulièrement dans l'absence d'aucune voie de fait ou tort prémédité, il n'y a pas d'action.

2o. Que pour maintenir une action en dommages causés par la négligence du défendeur, l'onus probandi quant à telle négligence incombe sur le demandeur, qui, en outre, sera tenu de prouver qu'il n'y a pas eu manque de soin de sa part, ou, s'il y a eu négligence de sa part, que telle négligence n'a nullement contribué au tort dont on se plaint.

3o. Qu'il faut produire preuve affirmative de précautions suffisantes à l'époque de l'accident.

4o. Que quand le dommage est causé par une personne dans l'exercice de ses droits légaux, il faut que le demandeur établisse qu'il n'y a pas eu faute de sa part, et qu'il y a eu négligence de la part du défendeur.

5o. Que dans le cas où le défendeur est coupable de négligence grossière causant le dommage, si le demandeur a montré un manque de soins ordinaires et a ainsi essentiellement contribué au tort, il n'a pas droit d'action.

Judgment rendered the 5th March, 1866.

The plaintiff brought suit against the defendants, before the Circuit Court for Lower Canada, sitting at Quebec, and declared that the defendants so negligently and carelessly managed their Rail-Road and locomotives thereon, that they caused their cars to come violently in collision with a certain horse of the plaintiff, whereby the horse was injured, &c., &c.

That the said injury was caused by the [fault of the defendants, in not taking proper precautions in running their cars across a public highway, the said defendants neglecting to station any persons where their said line of railway crossed the public highway, for the purpose of warning persons on the highway, which from the situation of the crossing was absolutely necessary, and for the want of which the said highway was rendered dangerous to travellers, going over the said crossing; to the damage of the plaintiff of \$140.00.

The defendants pleaded a *défense au fonds en fait*, upon which, issue having been joined, the parties respectively went to proof, and having been heard upon the merits, the action of the plaintiff was dismissed with costs: "Considé-
" rant que le demandeur a failli de prouver les allégations
" principales de sa déclaration."

Upon this judgment the plaintiff inscribed in review, and the facts of the case and the grounds for confirming the judgment of the Court below are fully stated in the reasons of the learned Judge who rendered the judgment in the Court of review.

BADGLEY Justice:—Action in damages for injury inflicted by defendants rail car upon the plaintiff's horse, by which his horse became unserviceable and useless.

The accident occurred in January 1865, in day light. The plaintiff is a brewer and supplies his customers by sending his beer round to them; upon the occasion in question his beer sleigh was under the care of a full grown lad, capable of taking proper care of it and of the horse attached to it, the horse was most gentle and could be led by a girl or a child, and moreover was accustomed to the movement of the railroad engines and cars and never started or was disturbed by them; finally, the driver was accustomed to them also and to the part of the road where

the accident occurred, having used that road for several months previously in serving his master's customers.

The position of the crossing where the accident occurred need not be further mentioned than by saying that the railroad track line is the main line from the west to Point-Levi, and at the locality in question, and for a considerable distance west and east of the place, the line was straight. The travellers' high-way had several months before the time of the accident crossed the track somewhat more to the east, where the crossing was at a right angle to the track, and it was deemed imprudent not to keep a road-keeper there to give notice to travellers of the approach of the cars. To remedy this inconvenience the Grand Trunk Railway Company, at the suggestion of the corporation of the town of Levi, where this crossing was situated, removed it to a point more to the west where, instead of the high-way being taken round the mills and buildings which at the former crossing thereby obstructed the sight of the track and of the trains going along the road either way, it was taken in front of those buildings and made to cross the railroad track obliquely. The breadth of this track is $5\frac{1}{2}$ feet and the crossing at right angles would necessarily be that measure also, but the oblique crossing occupies about ten feet, to that extent also remaining liable to accidents and necessarily requiring somewhat greater care on the part of travellers: it was not however considered necessary to station a road-keeper there, because the entire track west and east could be seen for a considerable distance by travellers near to the track in consequence of the high-way being in this manner carried in front of the buildings. It is in evidence that from the point A on the plan produced by the plaintiff, which was fifteen feet directly from the track and from the place where the accident occurred, an approaching traveller could see up and down the track about 250 feet, according to Mr. Larue, the surveyor, who drew the plan, but considerably more according to other witnesses examined, which extent of sight was

necessarily and of course prolonged at each foot of approach from that distance of fifteen feet to the track itself. Upon the occasion in question, the plaintiff's horse and sleigh, under the charge of his young man, a lad of eighteen, as he himself swears, were following another sleigh going in front. Up to about forty feet from the track the plaintiff's horse had been going at a trot, but from that time he went more slowly, *au pas*, the driver walking near the sleigh and holding the reins in his hand: the preceding sleigh was on the track when the approaching cars were seen, and the man in front beat his horse and pushed him across safely: the plaintiff's driver swears that his horse was nearly touching that *voiture* and must have been upon the track a little way and he thought he could get over also and made the attempt, but finding it useless he pulled his horse back and got both sleigh and horse from off the track; unfortunately however, the horse's head came in contact with one of the cars and received so heavy a concussion that the animal was stunned and thrown down, and has become useless, having lost his head, to use a common term; the horse was a good serviceable animal and was worth thirty pounds, its only worth now is its hide.

This is one of those cases in which questions of negligence and ordinary care come up for examination, and in which the judge presiding exercises not only judicially upon the law of the case, but also acts as a jury in settling the matter of fact of negligence or otherwise.

The general rule is that a plaintiff suing for culpable fault or negligence must himself be without any misconduct or fault and have used ordinary care, and that where an injury has resulted from the negligence of both parties, more especially if without any wanton or intentional wrong on the part of either, an action cannot be maintained.

In like manner the prevailing doctrine is that to sustain an action for negligence the burden of proof is on the plaintiff to show negligence, wilful or otherwise, by the defendant, and ordinary care by himself, or, that if he himself did not exercise ordinary care, this did not contribute to the alleged injury.

And it is further a prevalent doctrine, that there must be affirmative proof of due care *at the very time of the accident*.

I need scarcely add as a general summary that when damage is done by a party, in the exercise of his *lawful rights*, the plaintiff must prove that his loss occurred without his fault, and by the defendant's neglect.

So also it has been held, and is another rule in such cases, that though the defendant is guilty of gross negligence, causing damage to the plaintiff, but where the plaintiff himself was guilty of want of ordinary care, contributing essentially to the injury, the plaintiff cannot recover.

These are not new rules. Lord Ellenborough, as long ago as his time, so ruled in *Butterfield vs. Forester* that one person being in fault will not dispense with another using ordinary care for himself. "Two things, he said, "must concur to support this action, an obstruction in the "road by the default of the defendant, and no want of "ordinary care to avoid it on the part of the plaintiff." (1). The plaintiff has charged the infliction of the damage upon the defendants' gross negligence in running their cars upon the occasion in question. Now as respects the management of their cars our general railroad act, at section 104, provides that the bell or the whistle shall be sounded at a distance of 80 rods at least before arriving at crossings, and shall continue to sound at intervals until the engine has crossed the road; under penalty for each infraction of

(1) 11 East, 80.

\$80 payable by the company, who shall be liable for all damages suffered by persons injured.

It is clearly in evidence that the whistle was sounded at the whistling post, at the statutory distance and continued for what is termed a long whistle and was then followed by the bell which was kept ringing and sounding until after the crossing had been passed, and further, that immediately upon seeing the possibility of an accident, the engineer caused the whistle to be sounded for the breaks to be put on, which was done before the accident.

In so far as the requirements of the statute were to be observed, there was clearly no negligence on the part of the defendant. The statute plainly shows and common sense shows, that it is the duty of a Railroad Company to slacken speed at a turn, and to give warning when approaching a crossing; nor must it appear that such duties were disregarded when they attempt to show themselves not guilty of negligence. Upon this point it has been held that where the plaintiff was injured at a railway crossing by the collision of an engine, where the statute required at such points certain specified signals, that even compliance with the requirements of the statute will not excuse the company from the use of care and prudence, in other respects; and that it is not necessarily enough to excuse the company, that they proved the usual course adopted by engineers in such cases.

Whith such rulings of law as the above, it is clear that questions of negligence and ordinary care must depend upon the circumstances of each case: they are matters of fact to be considered in connection with all the circumstances of the particular case and to be determined upon the view of what prudence and skill require. Ordinary care in crossing a high-way may be gross negligence at that of a railroad and if facts are proved from which a deduction can be drawn, the presumption would be against the

defendant, subject to be rebutted however by the defendant's proof that he has taken the necessary precaution; in that case, the *onus* falls upon the plaintiff to show his own ordinary care, because wherever the plaintiff had reason to suspect the danger and might by the exercise of prudence have escaped it, he must fail to recover if he did not exercise that prudence. (1)

It is established in evidence, that the statutory signals were given, and moreover it has been proved that for a considerable distance beyond the whistling post, the engineer had slackened the usual speed from thirty miles to fifteen, and that in fact the speed was only about twelve from some distance before they reached the crossing; under these circumstances, the question of negligence cannot be held against the company, because that question as asked by the law depending upon the facts, first whether they had complied with all such statutory and reasonable precautions for the safety of travelling at the point, as would have had a tendency to prevent the accident in the particular circumstances of the plaintiff's case, and second, wheher in the management of their train, they were running with such speed as would be proper and suitable in approaching a highway, must be conclusively answered in the defendants' favour. They moreover proved that sign-posts were on the road on both sides of the crossings as required by the railroad act, and that the company were not bound to any other special precautions.

But besides all this, the plaintiff was bound to show ordinary care on his part to entitle him to maintain his action, because, even if the statutory precautions had been disregarded, the party suffering damage would not be entitled to recover, if he was himself guilty of negligence which contributed to the injury.

Now the driver was aware of the dangerous nature of

(1) *Holt vs. Wilkes, B. and Ald.*, p. 304 :—*Cotterill vs. Starkey*, 8 Car. & P., p. 601.

the crossing, it was part of his usual duty to cross there, he had been going fast until he got within forty feet of the track line, and then knowing the danger went *au pas*; he was not in his sleigh driving the horse and able to check it at any moment but walked at the side of it holding his reins; he was following another sleigh which got across safely, his horse almost touching it, and as he at the time told Letarte, a witness, *qu'il suivait une autre voiture et qu'il pensait avoir le temps de passer*.

Doubtless, he lost time in the attempt to cross, and also, lost more time in pulling back; he was not even then in his sleigh, nor is it shewn that when the horse was struck he held him in hand. But he did draw his horse back, the horse was most steady, most manageable, not frightened by the railway trains, and yet, having escaped the engine and tender which were narrower than the cars, the horse also escaped the two first cars, because the driver himself, who must have known and seen how the accident happened and how, and when, and by what means the horse was struck, much better than the two witnesses of the defendant, who only believe that the animal was struck by the baggage car, the driver himself admitted at the time to Bégin, a witness examined in the case, *que c'était le troisième char qui avait frappé le cheval*; having escaped the two preceding cars and been struck by the third, the deduction appears to be plain enough that the driver had not acted with care, had not drawn his horse far enough from the track or had slackened his hold upon the horse's head which having turned or advanced, was struck by the car.

With a knowledge of the danger, it does seem that in passing such an intersection and under all the circumstances of this case, it was the driver's duty, and it would be the duty of travellers generally, to stop and listen, and look both ways to ascertain by both senses, whether a train was within sight or hearing, and if the want of this pre-

caution contributed, as in this case it certainly did, directly to the injury sustained, the plaintiff cannot recover, even if the defendants were in like fault on their part, which has not been proved.

Doubtless, from the evidence adduced, the whistle and bell must both have been heard, and the approaching train must have been seen in time for the driver to keep his horse safely off the track, but the driver, as too often happens, eager to cross, miscalculated his time and thought that he would have got across safely also, like the traveller ahead of him. *

The evidence of the persons brought up by the plaintiff to prove that the whistle was not heard, is of no value; none of them denying but what it might have sounded, although they did not hear it, being at the time otherwise occupied, and moreover their testimony is contradicted in the plainest and most positive terms by the evidence of several witnesses, produced by the defendants.

The judgment of the Superior Court by which the plaintiff's action has been dismissed, must be maintained, and the revision also dismissed with costs against the plaintiff. (1)

ANDREWS & ANDREWS, for respondent.

LELIEVRE, Q. C., for defendants.

(1) In the case of *Stubley vs. The London and North Western Railway Company*, (*) the marginal abstract is as follows:

"Negligence—Railway—Level crossing.—There is no general duty on railway companies to place watchmen at public footways crossing the railway on the level; but it depends upon the circumstances of each case whether the omission of such a precaution amounts to negligence on the part of the company.

"A railway was crossed by a public footway on a level, and was protected by gates on each side of the line, and caution boards were placed

(*) *Common Law series of the Law Reports*, 1 Court of Exchequer, p. 13.

near the gates. The view of the line from one of the gates was obstructed by the pier of a railway bridge crossing the line; but on the level of the line it could be seen for 300 yards each way. A woman approaching the line by that gate was detained by a luggage train on her side, and immediately on its having passed, crossed the line, and was run down and killed by a train coming along the other line of rails. There was no evidence of negligence in the mode of running the trains :—

Held, that there was no evidence of negligence on the part of the company, but that there was evidence of negligence on the part of the deceased.

Bilbee vs. The London, Brighton, and South Coast Railway Company, (*) considered.

And in the case of *Stapley and another, Executors, vs. The London, Brighton, and South Coast Railway Company*, (†) the abstract is as follows :

Negligence—Railway Company—Level Crossings—Injury to foot-passenger—Absence of Protection for Carriage Traffic.—The defendants' railway crossed on a level a public carriage and footway near to the P. station. There were gates across the carriage-way, and a turnstile for the use of foot-passengers. S., a foot-passenger, whilst traversing the railway at the level crossing, was knocked down and killed by one of the defendants' trains. At the time of the accident, contrary to the provisions, by statute and by the defendants' rules, for the safety of carriage-traffic, the gates on the side of the line were partially open, and there was no gate-keeper present to take charge of them; although no traffic was passing across, and although a train was overdue. In an action against the defendants by the executors of S. :—

Held, that there was, under the circumstances, evidence of negligence on the part of the defendants to go to the jury, inasmuch as by neglecting the required precautions for the safety of carriage-traffic the defendants might be considered to have intimated that their line might safely be traversed by foot-passengers.

Bilbee vs. The London, Brighton and South Coast Railway, (†) followed.

(*) 18 C. B. (N. S.) 584; 34 L. J. (C. P.) 182.

(†) *Ib.* p. 21.

(†) 18 C. B. (N. S.) 586; 34 L. J. (C. P.) 182.

COUR DE CIRCUIT.—ARTHBASKA.

Présent :—STUART, Juge.

LEMAY.....Demandeur,

vs.

LA MUNICIPALITÉ DE CHESTER OUEST.....Défenderesse.

Jugé :—Qu'un inspecteur des chemins ne peut lier une municipalité pour les travaux qu'il fait faire, à l'insu de la dite municipalité; et qu'il faut une convention avec le corps municipal pour l'obtenir.

Held :—That a surveyor of roads cannot bind a municipality for works executed by his orders without the knowledge of such municipality; and that there must be a contract with the municipal body to bind it.

Jugement rendu le 11 mars, 1862.

Le demandeur poursuivait pour le recouvrement de la somme de £25, pour quatre ponts faits sur le chemin Craig, dans les limites de la municipalité de Chester Ouest, en 1858. La défenderesse plaida par une dénégation et par exception, disant qu'il n'y avait jamais eu de contrat entre le demandeur et la défenderesse au sujet des travaux réclamés, et que le tout avait été fait sans sa participation aucune. La preuve établissait les faits allégués par la défenderesse.

Talbot, pour le conseil :—Soutenait que le droit d'action, sous de telles circonstances ne comptait qu'en faveur de l'inspecteur contre le propriétaire du terrain traversé par le chemin sur lequel les ponts avaient été construits. (1)

L'action est en conséquence renvoyée avec dépens.

PACAUD, pour le demandeur.

HOULE, pour la défenderesse.

TALBOT, Conseil.

(1) Stat. Ref. du B. C., cap. 24, sec. 51, sous-sec. 5.

SUPERIOR COURT.—QUEBEC.

IN REVIEW.

Before:—BADGLEY, STUART and TASCHEREAU, Justices.

No. 136. { YOUNG.....*Plaintiff*
 { vs.
 { BALDWIN.....*Defendant*.

Held:—That interlocutory judgments subject to appeal can alone be inscribed for review. Jugé:—Que des jugements interlocutoires ceux seulement dont l'appel est permis sont sujets à révision.

Judgment rendered the 4th December, 1865.

The defendant inscribed the cause for review of two interlocutory judgments rendered by the Superior Court, on the 9th October, 1865, dismissing the defendant's demurrer to the special answer to the temporary exception, dismissing the defendant's demurrer to the special answer to the second and third perpetual exceptions, and, lastly, dismissing the defendant's demurrer to the special answer to the fourth perpetual exception.

Upon this it was moved on behalf of the plaintiff that the inscription for review be declared of no effect and made void:

1° Because these interlocutory judgments could be remedied by the final judgment in the cause.

2° Because these judgments could not be reviewed and examined by three judges of the Court sitting as a Court of review.

Judgment:—Motion absolute.

VANNOUVE, for plaintiff.

PEMBERTON, for defendant.

QUEEN'S BENCH, }
APPEAL SIDE.

DISTRICT OF QUEBEC.

Before:—DUVAL, Chief-Justice, AYLWIN, MEREDITH,
DRUMMOND, and MONDELET, Justices.

VANFELSON *Appellant.*

and

MANN *Respondent.*

The respondent sold to the appellant a quantity of futtocks of certain sizes, set forth in written contracts signed by them respectively. It was covenanted that the appellant should send a man to work for the respondent, and superintend the getting out of the futtocks, the appellant agreeing to receive everything marked off for her by the man she would select for that purpose. The respondent tendered to the appellant a quantity of futtocks which were, although marked off, under size and of an inferior quality, which she refused to accept:—

Held:—That the *mandat* of the man so selected by the appellant only extended to judge of the quality of the futtocks got out by the respondent; that he had nothing to do with their size, which was fixed by the contract, and that he had no power or authority to bind the appellant by marking off futtocks that were not of the sizes and quality stipulated.

L'intimé vendit, et l'appelante acheta, une quantité de courbes, *futtocks*, de certaines dimensions, établies par contrats sous seing privé. Il fut convenu que l'appelante enverrait un homme travailler pour l'intimé, et pour surveiller la confection des courbes, l'appelante s'obligeant de recevoir tout ce que l'homme choisi par elle pour cet objet marquerait comme recevable. L'intimé offrit à l'appelante une quantité de courbes qui étaient, quoique marquées, au-dessous des dimensions voulues et de qualité inférieure, lesquelles elle refusa d'accepter:—

Jugé:—Que le mandat de l'individu choisi par l'appelante ne s'étendait qu'à juger de la qualité des courbes fournies par l'intimé; qu'il n'avait rien à faire avec leurs dimensions, qui étaient établies par le contrat, et qu'il ne pouvait lier l'appelante en marquant des courbes qui n'étaient pas des dimensions voulues et de la qualité stipulées.

Judgment rendered the 28th December, 1865.

The plaintiff, in the Court below, declared against the defendant in an action of *assumpsit*, alleging, that on the 20th October, 1863, by agreement *sous seing privé*, between the plaintiff and the said defendant, Louise Hélène Vanfelson, acting therein through her husband, her authorized attorney, the plaintiff sold, and the defendant bought, all the futtocks that the plaintiff should make during the then coming season, at the rate of six dollars per piece, to be delivered at Cap Rouge, not later than the 1st day of July, 1864.

that it was further agreed that the defendant should send up a man to work for the plaintiff and superintend the getting out of the futtocks, that the defendant agreed to receive anything marked off for her by the man she should so select to go up: one half of the futtocks to measure thirteen inches, and the other half fourteen inches.

The plaintiff then alleged a second agreement of the same description entered into between the said parties, on the 28th November, 1863, for a further quantity of futtocks to be delivered at Point Levi.

The plaintiff also alleged, that, under the said contracts, he had delivered to the defendant a large number of futtocks, which were of the sizes and quality required, and of the value of \$6810, and concluded that the defendant be condemned to pay him that amount.

To this action the defendant pleaded, first, the general issue, and secondly, a perpetual exception in which it was in substance alleged that the futtocks offered by the plaintiff were undersized and not according to mould, with the exception of a very small number, which the defendant was ready to accept and pay for, refusing the remainder, tendering the value of those she was ready to pay for, with costs then accrued.

Issue having been taken upon these pleadings, generally, and the parties having been heard, the Superior Court rendered the following judgment:

The Court, &c.—Considering that under the agreement set forth in the plaintiff's declaration, it was expressly agreed between the plaintiff and the defendant, Louise Hélène Vanfelson, that she, the defendant, should send up a man to work for the plaintiff, and superintend the getting out of the futtocks, which form the subject of the said agreements, and she thereby agreed to receive anything

marked off for her by the man so selected to go up for her. Considering that, in fulfilment of the said agreements, she, the said defendant, sent up one Philippe Ferland, who superintended the making, by the plaintiff, of the futtocks, for the price of which the present action is brought, and accepted them for the defendant, and marked them for her. Considering that the said defendant hath expressly agreed to receive anything so marked off for her, and that she is bound by the said agreement, the Court doth dismiss the defendant's plea of perpetual peremptory exception, and doth adjudge and condemn the defendant, Louise Hélène Vanfelson, for the causes stated and set forth in the plaintiff's declaration, to pay the plaintiff the sum of six thousand eight hundred and ten dollars, with interest, &c.

It was from this judgment that an appeal was instituted.

L'ELIEVRE, Q. C., for appellant:—By the final judgment rendered in the cause, it is said: "Considering that, in fulfilment of the said agreements, the said defendant sent up one Philippe Ferland, who superintended the making, by the plaintiff, of the futtocks, for the price of which the present action is brought, and accepted them and marked them off for her." *Acceptation* of these futtocks implies delivery for the defendant. Now, where was delivery to be made? The terms of the written contracts answer this question. The plaintiff sold, and the defendant purchased, "deliverable at Cap Rouge," under the first contract; under the second contract, "deliverable at Point Levi." It was assuredly no part of Ferland's business to accept delivery at Cap Rouge? His powers were limited to "superintending the getting out of the futtocks," the defendant "agreeing to receive everything marked off for her by the man she selected to go up. *One half the futtocks to measure 18 inches, the other half fourteen; Mr. Mann to furnish as many large ones as he can.*"

It is clear from this that the mission of Ferland was not to accept the futtocks, but merely to superintend, not the making, but the getting out of the futtocks; and, therefore, the *considérant* of the judgment which goes to say that Ferland *accepted* the futtocks for the defendant is unfounded in fact. It was not within his powers to accept them in Upper Canada, where they were made; they were deliverable at Point Levi and at Cap Rouge, in Lower Canada; and assuming, for a moment, that he had accepted delivery, he would manifestly have exceeded his *mandat*, and would have, in any case, failed to bind the defendant. This would be true in any case, as the party contracting with an agent is bound to ascertain his powers. But how much more true is it in the present case, when the powers of the agent were set out in a written contract signed by himself, the plaintiff?

The difficulty between the parties arose not so much in consequence of any pretended delivery elsewhere than at the places fixed by the contract, but in consequence of the attempted delivery by the plaintiff, at Cap Rouge and Point Levi, of an article totally different from the futtocks mentioned and described in the contract.

The article to be delivered under the contract was a quantity of futtocks of thirteen and fourteen inches and above that last figure, not more than one half to be thirteen inches. Such was the article sold; such was the article purchased. What was offered, with the exception of the numbers mentioned in the pleadings as being of the required size, was not only undersized, but a large portion of them was timber of an inferior quality, decayed and plugged; and many of the pieces of timber were not even futtocks, inasmuch as they were not provided with a root which forms the bend and gives it strength for the purposes of ship-building. The defendant had purchased for that purpose, and the plaintiff knew it.

But says the judgment complained of:—"Considering
 "that the said defendant hath expressly agreed to receive
 "anything so marked off for her, and that she is bound by
 "the said agreement, the Court doth dismiss the defend-
 "dant's plea of perpetual peremptory exception," &c., &c

The interpretation thus given of the contract in question, does not appear to the defendant the sound, equitable interpretation which it ought to receive from a Court of Justice. It surely could not be meant that if Ferland marked off a piece of fire-wood as a futtock, the defendant would be bound to accept it as such, and pay six dollars for it. The size of the futtocks was fixed by the contract, and neither Ferland nor the plaintiff had a right to depart from it in that respect. The fact is, that Ferland had nothing to do with the size of the futtocks. He had been sent for the purpose of ascertaining that they were of good quality, and of a make corresponding with a mould that was furnished him. How he fulfilled this duty, or rather how totally he failed to do so, appears from the evidence produced by the appellant.

Ferland was the *mandataire* of the appellant; he was commissioned to inspect certain futtocks of thirteen and fourteen inches or above, and to see that they were of good quality, and upon ascertaining the latter fact, and that they fitted the mould he had in his possession, to mark them off. If, in the exercise of his duty as agent, he accepted futtocks under the size fixed by the contract, he exceeded the powers confided to him by the *mandat* of the appellant, and she was not bound by his act. (1)

By the *considérant* last above referred to, it is said:
 "that the defendant expressly agreed to receive anything
 "so marked off for her." Certainly, she did so expressly
 agree to receive anything so marked off for her, but of the

(1) Pothier, du Mandat, Nos. 90 et suiv.—2 Kent's Com., p. 484.—18 Duranton, Nos. 231 et seq.

sizes mentioned in the said contract. Surely it cannot be contended that, if Ferland had marked off as many inch-boards as he has marked off of the pretended futtocks in question in the cause, that the appellant would be bound to pay \$6.00 for each.

This same *considérant* goes on to say that she is bound by the said agreement. So she is; but is not the respondent equally bound by the agreement in question? and if so, how could the Court sanction, without violating the agreement, the delivery of an article undersized, inferior in quality, not according to mould, and, a portion not even futtocks?

IBVINE, for respondent:—The principal question which is presented for the decision of the Court is, whether the appellant was not bound by the contracts to accept all the futtocks which her agent marked off for her—whether, in fact, the marking of the timber by Ferland was not an acceptance by the appellant which precluded her from afterwards objecting to any of the pieces thus accepted by her agent. It appears by the evidence of Mr. Forsyth that when the respondent was about making his contract with Mr. Lee, he insisted that some person should be sent to Upper Canada, where the timber was to be manufactured, to receive the futtocks there, evidently intending to protect himself from any loss which he would suffer if a dispute arose after his arrival in Quebec. It was accordingly stipulated that a man should be sent up to superintend the getting out of the futtocks, “and Mr. Lee agreed to receive everything marked off for him by the man he selects to go up.” It is not pretended that there was any fraud between the respondent and the appellant’s agent; and it is not denied that the futtocks now said for were all accepted by him, and were delivered in Quebec within the time required.

The respondent submits that whatever difference of

opinion may exist in the minds of the witnesses as to the quality and sizes of the futtocks, the parties had agreed to submit to the judgment of Ferland, and the appellant is bound by his decision.

MONDELET, Justice :—Two questions arise in this case.—
1° Ferland being the person sent up by Mr. Lee, to work for the respondent, and superintend the getting out of the futtocks, and Mr. Lee having agreed to receive everything marked off by the man he selected to go up, and the contract between the appellant and respondent being that one half of the futtocks would measure 18 inches, and the other half 14 inches and upwards, was the appellant thereby bound to receive futtocks, which were neither of a good quality, nor of the measure agreed upon ?

2° Was the marking by Ferland an acceptance, and could the plaintiff thereby allege and legally maintain that such marking by Ferland, was an acceptance by the appellant ?

Most distinctly, I answer both questions negatively.

The case then, in my opinion is narrowed down to this : Were the futtocks of the measure stipulated and agreed upon, and were they of a good and proper quality ?

The above, of course, is to be determined by the evidence respectively adduced by the parties.

The evidence adduced by the respondent, plaintiff in Court below, is anything but satisfactory, and surely the Court below would have been right, if it had declared good and valid, the tender made by the appellant, and dismissed the respondent's action *quant au surplus*. On reading the respondent's evidence, one is struck with the glaring fact, that these futtocks are not even by his own witnesses, who came down to Quebec, without being subpoenaed, evidently to bolster up the respondent's case, stated to have been measured and to have corresponded to the measure stipulated

and agreed to by and between the parties. True, Ferland speaks more positively, but his evidence is altogether nullified by that of Mercier and other witnesses examined on behalf of the appellant, and by a large number of other witnesses.

"Le gabari fut appliqué à 885 *futtocks*, par Lachance, en ma présence," says Mercier, "il ne s'en trouva que onze qui répondissent au gabari. Je mesurai moi-même, en présence des personnes sus-nommées, (1) chacun des dits *futtocks*, et le mesurage donné par M. Myler dans son témoignage est correct."

"Subséquentement, vers le douze, nous nous rendîmes à la Pointe-Lévi. Dans cette occasion, j'étais accompagné de MM. Coker et Ridley, tous deux inspecteurs de Lloyd, du dit Lafrance et du dit Myler. Dans cette occasion, encore, Lachance appliqua le gabari à 237 morceaux de bois; il ne s'en trouva que deux qui correspondaient au gabari. Je mesurai le même bois et le mesurage fut pris sur le champ par M. Myler, et les mesures données par lui dans son témoignage sont correctes."

Mercier states that "la plupart de ces *futtocks*, au Cap Rouge et à la Pointe-Lévi, n'avaient que des petits bouts de racine, et c'est ce qui fait qu'ils ne pouvaient cadrer avec le gabari."

It is not to be wondered at that the respondent declined cross-examining Mercier whose evidence is in all respects precise and positive, and resting upon his personal knowledge of what he testifies to. The same prudential course is had with respect to most of the other numerous witnesses examined by the appellant. (2)

(1) Ces personnes sont : Michael Myler, Pierre Lachance et M. Ridley, un des inspecteurs de Lloyd, à ce port.

(2) The witnesses examined by appellant are besides Mercier : Michael Myler, Jean Côté, Michael Carroll, Pierre Lachance, Jean Guérard, Edmund W. Sewell, Charles Robert Coker, James Ridley, James Tibbits, William Henry Baldwin, Henry Dinning, Victor Bérubé, Joseph Bell Forayth, Eusèbe Houde and Téléphore Paradis.

It appears to me that the case of the appellant is most conclusively made out, and not even open to a doubt as to whether the futtocks were or not sound and good, and of the measure stipulated and agreed upon.

The appellant has thought proper in her exception, to declare she offered to accept 108 pieces deliverable at Cap Rouge, and was ready to pay for the same, at the rate of \$6 per futtock, making the sum of \$648, which she alleged she offered and tendered, together with the sum of \$40.50 for costs, *sauf à parfaire*.

As to the futtocks deliverable at *Point Levi*, the appellant refused them altogether for want of size, and measure and soundness of the wood, and offered to be delivered only on the 2nd March, 1864, instead of in the month of January and February, 1864.

Such being the state of the case, this Court should either dismiss the respondent's action altogether, in consequence of his not having accepted the *offres*, or give judgment for \$648, \$40.50 costs, or whatever they are, *s'il y a lieu à parfaire*, and condemn the respondent to pay all costs subsequent to the tender.

The judgment of the Court below must, therefore, be reversed.

MEREDITH, Justice :—The evidence in this cause establishes beyond doubt that the futtocks, for the price of which the respondent has sued the appellant, are not, even nearly, of the dimensions required by the contract between the parties. On the other hand it is certain that all those futtocks were got out under the superintendence of Philippe Ferland, an agent named by the appellant for that purpose; and that he also marked those futtocks for the appellant as being intended for her under the contract.

We have therefore to decide whether the appellant was

bound to accept the futtocks so marked for her by Ferland, they not being, as to dimensions, in accordance with the contract; nor, as it is proved, fit for the purpose for which the futtocks contracted for were required.

The view that I take of this matter may be stated in a few words. In contracts for the delivery of timber, and other contracts of the same kind, there are some points that may be defined with absolute certainty by the contract itself; for instance the species and dimensions of the things to be delivered; but there are other points which cannot be defined with certainty by the contract; for instance the quality and mode of manufacture. With respect to the latter points—if the contracting parties differ when the things are tendered for acceptance—the matter must be left to the decision of some third party; and it is on this account that inspectors, cullers, and other officers of that kind, are named by law.

In the present case the appellant required a certain number of futtocks of certain dimensions, and she knew that futtocks of other dimensions would be comparatively useless to her. There was no difficulty in defining with certainty the dimensions of the futtocks to be delivered under the contract. And accordingly this was done; but it was impossible to define, with the same degree of certainty, the mode in which the futtocks should be manufactured, and the qualities of the wood from which they were to be made. As to these points, as I view the contract, it was accordingly agreed that the appellant should select a person whose decision was to be binding upon both parties; and Philippe Ferland was the person so selected.

In a word, the parties made the contract their law as to the points that could be settled with certainty by the contract, for instance the dimensions of the futtocks; and they made the judgment of Ferland their law as to the points that could not be settled with certainty by the contract,

for instance the quality and shape of the futtocks. I therefore think that the appellant could not refuse the futtocks marked for her by Ferland, on the ground that they are not of good quality; but on the other hand, I think that Ferland had no power to substitute his judgment for the agreement of the parties, upon a point clearly settled by the contract; and therefore that his acceptance of futtocks not in accordance with the contract, as to their dimensions, is not binding upon the appellant.

It appears hard that the appellant should be allowed to reject futtocks which were marked for her in Upper-Canada by a person of her own selection; but on the other hand, the respondent knew, or at least had, from the contract, the means of knowing that he had no right to offer, and that Ferland had no power to receive, the futtocks in question; and neither the wrongful act of the respondent, nor the wrongful act of Ferland, nor of the two together, can be binding on the appellant.

I therefore am of opinion that although the futtocks were marked for the appellant by her agent, yet as they are not in accordance with the contract, as to their dimensions, that the appellant was not bound to accept them; and that the judgment of the Superior Court which tends to compel her to do so, must be reversed.

The Court, &c.—Considering that the plaintiff in the Court below, respondent in this Court, hath failed to prove the material allegations of his declaration:

Considering that the appellant, defendant in the Court below, hath, on the contrary, proved the material allegations of her exception, and namely: that the futtocks which respondent caused to be offered to her, were unsound, of a bad quality and in no wise responded to the measure agreed upon by and between appellant and respondent, to wit, one half thereof being under 13 inches, and the other half being under 14 inches as stipulated;

Considering that the pretended acceptance by Philippe Ferland, who marked the futtocks as receivable, is not binding upon appellant, inasmuch as the said Ferland had no power or authority to receive such futtocks as were not of the measure and quality stipulated between appellant and respondent ;

Considering nevertheless that appellant hath thought fit and advisable to declare her acceptance of 108 pieces of the said futtocks delivered at *Cap Rouge*, and her readiness to pay for the same, at the rate of six dollars for each such futtock, making the sum of \$648 which she has since the institution of respondent's action, duly offered, together with a further sum of \$40.50 for costs, *sauf à parfaire*.

Considering that respondent cannot in law recover of and from appellant, more than the above mentioned sum of \$648, together with the further sum of \$40.50 for costs incurred on his action, *sauf à parfaire*, if any additional costs be legally recoverable, there is, in the judgment rendered by the Superior Court for the district of Quebec, of the 19th day of April, 1865, error, and the same should be reversed, and is, by this Court, reversed, annulled and set aside, and this Court proceeding to render the judgment which the said Superior Court should have rendered, it is hereby adjudged that the said appellant be, and she is hereby condemned, to pay and satisfy to the respondent, the said sum of \$648, together with \$40.50 for costs up to the day the said sum of \$648 was duly offered to respondent, and which offer this Court declares good and valid, *sauf à parfaire*, on taxation of costs. And it is further adjudged that respondent do pay to appellant all costs incurred by said appellant since said offer, as well in the Court below as in this Court.

LELIEVRE, Q. C. for appellant.

HOLT & IRVINE, for respondent.

BANC DE LA REINE, } DISTRICT DE MONTRÉAL.
EN APPEL.

Présents :—DUVAL, Juge-en-Chef, AYLWIN, MEREDITH,
DRUMMOND et MONDELET, Juges.

HARNOIS.....*Appelante.*

et

XAVIER DIT ST. JEAN.....*Intimé.*

Jugé :—Qu'une action en séparation de biens peut être portée hors du district où les conjoints sont domiciliés, pourvu que l'assignation soit donnée personnellement au défendeur, dans le district où l'action est ainsi portée.

Held :—That an action *en séparation de biens* may be brought out of the district where the parties have their domicile, if the service be a personal service upon the defendant, within the district where the suit is brought.

Jugement rendu le 8 mars, 1866.

L'action était portée par l'appelante pour obtenir une séparation de biens d'avec son mari, le défendeur. Quoique les parties fussent résidentes dans le Circuit de Richelieu, l'action fut cependant portée dans le district de Montréal, dans les limites duquel signification en fut donnée au mari. La demanderesse avait été autorisée par un des juges à poursuivre *in forma pauperis*. Le défendeur ayant fait défaut, l'appelante fit son enquête et inscrivit sa cause pour jugement.

Le 30 juin, 1865, le jugement suivant fut prononcé :
BERTHELOT, juge.

“ La Cour, etc.—Considérant que les parties en cette cause ont contracté mariage en la paroisse de Lavaltrie, district de Richelieu, en février, 1860, où elles ont eu depuis et avaient encore au temps de l'institution de cette action, leur domicile, et que l'action de la demanderesse, contre le défendeur, son mari, en séparation de biens, devait être intentée dans le district où les parties ont eu, depuis leur mariage, et ont encore leur domicile, a renvoyé la deman-

deresse de sa demande, pour se pourvoir dans le district qu'il appartiendra."

La demanderesse se pourvut en appel contre ce jugement, alléguant, entre autres choses, "qu'il était en contradiction formelle avec la section 26, chap. 82, des Statuts "Refondus du Bas-Canada," règle générale qui se trouve confirmée par l'acte 27 et 28 Vict., chap. 17, sec. 12, sous sec. 3, concernant la faillite.

L'appel procéda également par défaut, et le 8 mars, 1866, intervint le jugement qui suit :

La Cour, etc.—Considérant qu'aux termes du chap. 82, sec. 26, des Statuts Refondus du Bas-Canada, l'intimé, défendeur en Cour de première instance, bien que, lors de l'assignation à lui faite en cette cause, il fût domicilié, ainsi que l'appelante, son épouse, dans le district de Richelieu, où ils ont contracté mariage, a pu légalement être assigné dans un autre district, pourvu que l'assignation lui fût faite personnellement; considérant que le dit défendeur a été bien et dûment assigné personnellement en la cité de Montréal, dans le district de Montréal, à comparaître en la Cour Supérieure, du susdit district, par sa dite épouse, en *séparation de biens*, de laquelle signification, au reste, le dit défendeur ne s'est pas plaint; considérant qu'il résulte de ce qui précède, qu'il y a erreur dans le jugement dont est appel, savoir, le jugement rendu par la Cour Supérieure, siégeant à Montréal le 30 juin, 1865, déboutant la dite action en séparation de biens; cette Cour casse, annule et met au néant le dit jugement; et procédant à rendre le jugement qu'aurait dû rendre la dite Cour Supérieure, prononce la séparation de biens.

PROHÉ, pour l'appelante.

SUPERIOR COURT.—QUEBEC.

SITTINGS IN VACCAATION.

Before :—TASCHEREAU, Justice.

No. 25. { GIBB.....*Plaintiff*.
 { vs.
 { POSTON.....*Defendant*.

Held :—1o That to entitle a party to the issuing of a writ in the nature of a *quo warranto*, a *prima facie* case must be made out on affidavit.

2o. That the polling of illegal votes in his favor will not *per se* annul a candidate's election, unless it be alleged and proved that some other candidate had a greater number of legal votes polled in his favor at the said election.

Jugé :—1o. Que pour autoriser l'émission d'un bref de la nature d'un *quo warranto*, un affidavit établissant *prima facie* cause suffisante, doit être produit.

2o. Que l'enregistrement de votes illégaux en sa faveur, n'annulera pas *per se* l'élection du candidat, à moins qu'il ne soit allégué et prouvé qu'un autre candidat avait un plus grand nombre de votes légaux enregistrés en sa faveur à cette élection.

Judgment rendered the 16th January, 1866.

The proceedings in the cause were commenced by the plaintiff to test the validity of the election of the defendant as one of the directors of the Union Bank.

The plaintiff by a *requête libellée* under the provisions of the 88th cap., Con. Stats., L. C., petitioned a justice of the Superior Court for the issuing of a writ, ordering the defendant to appear and answer the petition or *requête libellée*, and to show the authority under which he assumed to hold the office and franchise of a director of the Union Bank ; concluding with a prayer that the said defendant should be ousted from the said office of director, and should be condemned to a fine and the costs ; the plaintiff reserving to himself the right of taking more ample and further conclusions in the premises.

In his petition the plaintiff alleged the incorporation of the Union Bank of Lower Canada, and the appointment of Messrs. Levy, Burstall, Sharples, Roberts, Dunn and Mountain, as provisional directors of the same, for certain objects and with certain powers. That the said provisional directors caused stock books to be opened, in which he,

the plaintiff, subscribed his name for sixty shares, on which shares he had subsequently paid ten per centum, and that thereupon, he, the plaintiff, had become and had since continued to be a subscriber to the capital stock of the said bank, and that he was interested in the said institution, and in the office or franchise of director of the same. That since, he, the plaintiff, had become a subscriber to the said capital stock, to wit, on the 12th December, 1865, one Edward Poston (the defendant) had usurped, intruded into and unlawfully held the office of director, and had since continued unlawfully to hold the said office.

That since his usurpation of the said office, Poston had, with other persons pretending also to be directors of the said bank, illegally possessed himself of divers portions of the capital stock of the bank, including a sum of \$600.00, paid by the plaintiff, on account of the amount subscribed for by him, that he, Poston, had attended meetings of the pretended directors of the said bank, had exercised and usurped the right of electing a president, vice-president and other officers of the bank, and had made calls of money from the several shareholders upon the shares subscribed for by them. And that he, the plaintiff, was desirous of preventing the further continuance of the said Poston in his usurpation of and intrusion into the said office.

Two affidavits were produced in support of this petition, one sworn to by the plaintiff himself, and the second by William Home, of Quebec, Merchant. Gibb, the plaintiff, swore, that he was a subscriber to the stock of the Union Bank of Lower Canada, and was interested in the office or franchise of director of that institution, and that he had been informed and believed that Poston, the defendant, had, since the 12th of December, 1865, exercised and still continued to exercise the office of director of the said bank.

Home, in his affidavit, deposed that on the 12th December, 1865, he was present at a meeting of the stock-

holders of the Union Bank, previously called by notices in the newspapers and held for the purpose of electing seven directors to manage the affairs of the said bank. That scrutineers were appointed at the said meeting, and that a number of persons present ordered and resolved that the voting or ballot tickets should be issued by the said scrutineers, and that the said ballot tickets which were in the possession of the provisional directors were taken from them, handed over to the said scrutineers and issued by them, and that they then and there proceeded to receive the votes and subsequently counted them. That voting tickets were issued in favor of persons whose names stood in the list of directors, but who were not present at the meeting, and were delivered by the scrutineers to persons who claimed to hold the proxies of the said absent persons. That Messrs. Burstall and Mountain, two of the provisional directors of the said bank, then and there protested against the issuing of the ballot tickets, and the votes so given by proxies being received or counted, but that notwithstanding the protest the votes given by proxies were received and counted. That the number of votes given by proxies was very large, and that from a comparison of the number of votes which were afterwards reported by the said scrutineers to have been counted at the said election, with the list taken at the said meeting of the persons present, and the list of subscribers to the stock books, he, the deponent, had ascertained that more than one half of the votes given at the said meeting, and recorded and counted for the election of the defendant, Poston, were votes given by proxy for and in the names of absent subscribers. And the deponent further deposed that many of the voting tickets were by the scrutineers issued and delivered to parties representing themselves as trustees, and as having subscribed for shares as such, without the said parties showing their authority so to do, or even being asked by the scrutineers if they, the said parties, had any authority. And that to the knowledge of the deponent,

several persons voted as trustees, who were not trustees, and had never been appointed as such.

The defendant moved to quash the writ and the order of the Judge made on the plaintiff's petition.

1° Because no legal or sufficient affidavit as required by law in support of the petition, *requête libellée*, was produced before the Judge who ordered the issuing of the writ :

2° Because the affidavit of Home, produced before the Judge, did not allege or prove that the said Edward Poston had at any time intruded into or held or exercised any office in the corporation mentioned in the said petition :

3° Because it was alleged in the said affidavit that more than one half of the votes taken for the said Edward Poston were illegal, but it was not alleged and did not appear therein that any other person received a greater number of legal votes than the said Edward Poston for the said office :

4° Because it did not appear by the said affidavit that it was at any time pretended by the said Edward Poston, that he was elected a director of the said Union Bank :

5° Because it did not appear in the said affidavit that the said Poston had at any time exercised or pretended to exercise the office of director, which it was pretended in the petition, he usurped :

6° Because it was not alleged or sworn to in the said affidavit, that the said James Gibb, the petitioner, had any interest in the corporation of the said Union Bank :

7° Because the affidavit of the said Gibb, was irregular, inasmuch as, although the same was endorsed on and formed part of the said petition, no copy thereof was served on the defendant :

8° Because the affidavit of Gibb did not in any way support the allegations of the petition.

TASCHEREAU, Justice.—A petition has been presented to me on behalf of one James Gibb, in which it is alleged that Gibb was and had been, before the 12th day of December last, and has continued to be since that day, a subscriber to the capital stock of the Union Bank, and as such interested in the office of director of the said institution; that a meeting of the subscribers took place upon that day for the election of a board of Directors, to replace the provisional board, up to that time managing the affairs of the bank.

That upon the said 12th day of December last, Edward Poston usurped, intruded into, and unlawfully held and exercised the office and franchise of a director of the said bank, and, together with others also pretending to be directors of the said bank, hath since continued to act as director of the said Union Bank. That Gibb was desirous of preventing the further continuance of the said Edward Poston in his usurpation of and intrusion into the said office and franchise of a director of the said bank.

Gibb concluded for the issuing of a writ, commanding the said Edward Poston to appear and answer his petition, and so show the authority under which he acted and assumed to hold and exercise the office of director, and praying for his (Poston's) expulsion from the said office.

Gibb's petition was supported by two affidavits—his own and one sworn to by one William Home. In Gibb's affidavit he only swears that he (Gibb) is and has been a shareholder or subscriber, and that, since the 12th day of December last, Poston has filled the office of director, without in any way saying that Poston has illegally filled the said office.

Home's affidavit is much stronger. He swears that at a meeting of the shareholders, which took place on the 12th December, for the election of directors pursuant to notice, scrutineers were named, and that a number of persons present at the said meeting ordered that the voting

or ballot tickets should be issued by the said scrutineers. That the ballot tickets were issued by the said scrutineers, in favor of persons whose names stood in the list of subscribers, but who were not present at the said meeting, and were delivered by the said scrutineers to persons who claimed to hold proxies of the said absent shareholders. That Messrs. Burstall and Mountain, two of the provisional directors, had protested against the issuing of the said ballot tickets and the voting of the proxies, but that notwithstanding this protest the votes were taken and counted; that the number of votes so given by proxies for absent subscribers was very great, and that more than one-half of the votes given at the said meeting, and recorded for the election of Edward Poston, were votes given by proxy:

The defendant, Poston, moved to quash the writ which issued on Gibb's petition.

The principal ground of the motion to quash the writ, is, that the affidavits in support of the petition required by law are insufficient, and do not contain allegations of sufficient force to justify the issuing of a writ in the nature of a *quo warranto*.

The first question which presents itself, is:—Should the affidavits in support of similar petitions be so clear and ample as to establish all the facts of the alleged illegality of the proceedings complained of?—and the answer to this must be that this fulness of the affidavit is unnecessary where the petition itself does not fully set forth the fact.

But Gibb's affidavit does not even say that Poston, the defendant, fills the position of director of the Union Bank without a full right to do so. Home's affidavit is much more ample and explicit; but it only amounts to this—that at the meeting of stockholders of the bank, for the election of directors, subscribers bearing powers of attorney or proxies for absent stockholders, were allowed to vote, and that a great number of these votes were counted in favor of Poston. It is not alleged in the

said petition or affidavit that any other person had a greater number of legal votes than Poston. (I do not here decide the question of the legality of voting by proxy.) It is simply alleged that Poston had a number of illegal votes polled in his favour. I cannot admit the principles here attempted to be set forth, viz.: that the polling of illegal votes in favour of a candidate will *per se* annul his election. If Poston had been the only candidate, and had all the legal votes, would the casting of one, or two, or more illegal votes in his favour annul his election? Clearly not. In "Angel & Ames on Corporations," page 101, of the edition of 1856, this question is clearly decided. Home, in his affidavit, goes a great length. He says that more than half the votes given for Poston were proxy votes; but he ought to have gone further and said that after deducting these votes which had been given by proxy in favour of Poston from the total number polled in his favour, he, Poston, would have been in a minority of votes polled, and some other person would have been elected as director of the institution; further, an approximate idea of the number of votes polled for and against Poston should have been given.

It was objected on the part of the plaintiff, Gibb, that there was no way by which the number of votes could be established, inasmuch as the election was conducted by ballot, but I deny this. The voting tickets ought not to be destroyed at once. It was urged at the argument that where a simple doubt of illegality in the conduct or proceedings at an election was left upon the mind of the Judge, he would be justified in ordering the issue of the writ obtained by the plaintiff, and in support of this "Williams' Abridgment," page 228, was cited. But in this case there can be no doubt of the insufficiency of the affidavits. The motion to quash must therefore be granted, and the proceedings dismissed with costs.

Judgment:—The Court having heard the parties upon the motion to quash, &c.: Considering that no legal affidavit

was presented in support of the petition (*requête libellée*) in this cause, doth grant the said motion, and thereupon doth quash and make void the writ and order in the present cause, and doth dismiss the present action, with costs against the said James Gibb, *sauf à se pourvoir*.

CASALT, LANGLOIS & ANGERS, for plaintiff.

STUART, O'KILL, Q. C. & ALLEYN, Q. C. Counsel.

HOLT & IRVINE, for defendant.

LELIEVRE, Q. C., Counsel.

BANC DE LA REINE, } DISTRICT DE MONTRÉAL.
EN APPEL.

Présents :—DUVAL, Juge-en-Chef, MEREDITH, DRUMMOND
et MONDELET, Juges.

WALKER, *et vir*.....*Appelants.*
et

LA CORPORATION DE LA VILLE DE SOREL..... *Intimée.*

Jugé :—Que le défaut d'allégation, dans une demande par une femme séparée de biens contractuellement de son mari, du titre établissant cette séparation, doit être invoqué par exception à la forme, et non par défense au fonds en droit.

Held :—That the absence of allegation, in an action by a woman *séparée de biens contractuellement* from her husband, of the deed establishing such separation, must be pleaded by an exception to the form, and not by a *défense au fonds en droit*.

Jugement rendu le 8 mars, 1866.

Dans le bref de sommation, et dans la déclaration en cette cause, les appelants étaient décrits comme suit :
" Dame Mary Walker, de la ville de Sorel, dans le district
" de Richelieu, épouse contractuellement séparée de biens
" de John George Crébassa, écuyer, notaire public, du
" même lieu, et le dit John George Crébassa, en autant
" que besoin est pour autoriser sa dite épouse." Il n'y avait
dans la déclaration aucune autre énonciation de cette séparation contractuelle.

Les intimés plaiderent par une défense au fonds en droit, appuyée des moyens suivants :

10. Parce que rien ne fait voir que la dite Mary Walker ait un droit d'action en cette cause.

20. Parceque rien ne fait voir que la dite Mary Walker ait pu acquérir aucun domaine de propriété dans les immeubles revendiqués en cette cause.

30. Parce que rien ne fait voir que la dite Mary Walker ne soit pas commune en biens avec son époux, le défendeur, John George Crébassa.

40. Parce qu'il n'est aucunement démontré en la dite déclaration, que la dite Mary Walker soit, ou ait jamais été, séparée de biens de son dit époux, en aucun temps que ce soit, ni d'aucune manière que ce puisse être.

50. Parce qu'il n'est aucunement démontré en la dite déclaration, comment et en vertu de quels titres la dite Mary Walker ait pu acquérir les immeubles y désignés, et qui sont revendiqués par elle en cette cause.

60. Parce que d'après toutes les allégations de la dite déclaration, il n'appert pas que la dite Mary Walker soit propriétaire des dits immeubles, ou d'aucune partie d'iceux.

70. Parce que les dits demandeurs n'exposent aucun droit d'action dans leur dite déclaration.

Cette défense en droit fut accueillie et maintenue par le jugement rendu par M. l'assistant juge Laberge, le 12 de janvier, 1864, et dont suivent les considérants :

La Cour, etc. :—Considérant que la présente action est intentée par Dame Mary Walker, comme épouse séparée de biens contractuellement d'avec John George Crébassa, écuyer, son mari :

Considérant que le dit John George Crébassa n'est partie dans la présente action qu'en autant que besoin est pour autoriser sa dite épouse, la demanderesse : Considérant que la qualité de femme séparée de biens, prise par la

demanderesse dans la présente action, est exorbitante du droit commun, ne peut être prise de plein droit, et aurait dû être spécialement alléguée par les demandeurs dans la déclaration en cette cause :

Considérant, que dans la dite déclaration les demandeurs n'ont allégué et fait voir aucun droit de la demanderesse d'estimer en justice, et d'instituer la présente action comme séparée de biens d'avec son dit mari, n'alléguant pas la dite séparation et comment elle s'est opérée :

Considérant que, par suite, la déclaration faite par les demandeurs ne contient pas des allégations suffisantes en loi, pour en justifier et maintenir les conclusions, en autant que les réclamations faites en la dite déclaration, et en la présente action, sont exclusivement faites du chef de la demanderesse seule, maintient la défense au fonds en droit faite par les défendeurs à l'encontre de la présente action, et renvoie la dite action, le tout avec dépens contre les demandeurs etc.

La Cour d'Appel a infirmé cette décision en rendant le jugement qui suit :

La Cour, etc.—1^o Considérant que la dite appelante, dans sa déclaration, a poursuivi en sa qualité " d'épouse contractuellement séparée de biens de John George Crébassa, écr., N. P., et que le dit John George Crébassa ne paraît dans la cause comme demandeur, " qu'en autant que besoin est pour autoriser sa dite épouse : "

2^o Attendu que par une défense au fonds en droit la partie intimée a soutenu que la dite déclaration était insuffisante, en autant que la dite appelante ne citait pas le contrat de mariage entre elle et son dit époux :

3^o Considérant que le seul moyen de faire valoir l'objection que les intimés voulaient soutenir, était de le faire par voie d'exception à la forme, indiquant l'absence du titre de la séparation contractuelle alléguée, savoir : le con-

trat de mariage, et en conséquence attaquant la suffisance de la déclaration de l'appelante pour le manque de l'énonciation de tel titre :

4^e Considérant que par le jugement rendu à Sorel le 12 janvier, 1864, dans la Cour de première instance, maintenant la dite défense au fonds en droit, et renvoyant la demande de l'appelante, il y a mal jugé :

Il est ordonné par la Cour que le dit jugement soit infirmé, et procédant à rendre le jugement du tribunal, il est ordonné que la défense au fonds en droit soit renvoyée avec dépens.

GIROUARD, pour les appelants.

LAFRENNAYE & ARMSTRONG, pour les intimés.

BANC DE LA REINE, }
EN APPEL. } DISTRICT DE QUEBEC.

Présents :—DUVAL, Juge-en-Chef, AYLWIN, MEREDITH,
DRUMMOND et MONDELET, Juges.

PATTON..... *Appelant.*
et

MORIN..... *Intimé.*

Jugé :—1^o. Que le décret purge un immeuble de tous les droits de propriété, excepté dans le cas où le propriétaire est, lors du décret en possession de l'immeuble saisi *super non domino*.

2^o. Que si au moment de la saisie d'un immeuble le vrai propriétaire n'en est pas en possession, il doit, pour conserver son droit de propriété, s'opposer à la vente par les moyens ordinaires.

Held :—1^o. That the *décret* of an immoveable extinguishes all rights of property, except when the proprietor is in possession at the time of the *décret* of an immoveable seized *super non domino*.

2^o. That if at the period of the seizure of an immoveable the proprietor is not in possession thereof, he must, for the preservation of his rights of property, oppose the sale by the usual means.

Jugement rendu le 20 décembre, 1865.

L'action était au pétitoire. Le demandeur se prétendait propriétaire d'un immeuble situé à la Pointe-Lévis, et il alléguait que vers le commencement d'avril, 1863, l'intimé, défendeur en Cour Inférieure, s'était illégalement emparé d'une partie du dit immeuble, qu'il en gardait

injustement et malgré lui la possession ; puis il prenait les conclusions ordinaires d'une action pétitoire. . .

Les principaux faits de l'exception péremptoire en droit perpétuelle de l'intimé peuvent se résumer comme suit : Qu'il avait acheté ce terrain de l'Hon. F. Lemieux, par acte notarié du 18 juin, 1863, qui lui-même l'avait acquis du shérif à une vente faite en justice le 31 janvier, 1861, dans une cause de Frémont vs. Octeau ; que cette vente du shérif avait été faite sans aucune charge ni distraction, et après l'observation de toutes les formalités ordinaires et requises par la loi ; que le dit Octeau, dont l'immeuble avait été vendu en justice, l'avait acquis par actes notariés en date du 3 mai, 1836, et du 22 septembre, 1837 ; qu'à compter des dates respectives de ces deux actes de vente, le dit Octeau avait possédé la totalité du dit immeuble à titre de propriétaire, de bonne foi, franchement et sans inquiétation, jusqu'à la vente par décret qui en avait été faite sur lui, et que depuis c'était l'Honorable F. Lemieux, et ensuite lui, l'intimé, qui l'avaient possédés, outre ces titres et ces possessions, l'exception contenait trois allégations distinctes, invoquant au nom de chacun de ces trois propriétaires successifs, la prescription de dix ans entre présents et de vingt ans entre absents.

L'appelant répondit spécialement à ce plaidoyer qu'il avait possédé cet immeuble depuis le 1 mai, 1847 ; que l'adjudication du shérif invoquée par l'intimé avait été faite *super non domino*, et que la vente faite à Octeau le 3 mai, 1836, était illégale et nulle à la connaissance du dit Octeau, parcequ'elle avait été faite par une personne non autorisée à la faire, qu'Octeau avait lui-même reconnu cette nullité, en reconnaissant l'appelant pour propriétaire de l'immeuble, et qu'il était convenu d'en abandonner la possession aussitôt de ce requis ; qu'en conséquence de la description erronée des immeubles annoncés pour être vendus par décret sur Simon Octeau, l'appelant n'avait eu aucune connaissance que la propriété décrite dans sa dé-

claration, et qu'il réclamait par son action, s'y trouvait comprise.

Il résultait de l'ensemble de la preuve que Simon Octeau avait possédé le terrain en litige depuis 1836, et qu'après avoir fait un grand nombre d'actes de possession, il hypothéquait ce terrain pour un montant considérable.

L'intimé prétendit que même en supposant que le titre de l'appelant lui conférait la propriété du terrain, qu'il n'avait pas pris la précaution de s'en mettre en possession, ni de s'y maintenir jusqu'au décret, que cette omission devait lui être fatale, d'autant plus qu'il avait induit le public en erreur en laissant Octeau en possession du terrain, et en le laissant même vendre par décret sans s'y opposer. L'intimé, après discussion des faits ci-dessus, cita à son appui, Pothier, Proc. Civile, vol. 7, pp. 207, 265, qui dit :

“ La *saisie réelle* doit se faire sur le propriétaire de l'héritage ; une saisie faite *super non domino* est nulle :

“ Observez, néanmoins, qu'on entend par propriétaire, non pas seulement celui qui l'est dans la vente, mais encore celui qui possède l'héritage *animo domini*, soit qu'il en soit véritablement propriétaire, soit qu'il ne le soit pas ; car il est réputé l'être lorsque le véritable propriétaire ne réclame pas ; ce qui suffit pour que la saisie faite sur lui soit valable, et purge même le droit du véritable propriétaire, s'il ne s'y oppose pas :

“ Un tiers peut aussi interjeter appel du décret s'il prétend qu'on a mal à propos compris dans l'adjudication quelque chose qui lui appartenait, et dont il était en possession, je dis *dont il était en possession*, car s'il n'en était pas en possession, que la saisie eût été faite sur celui qui possédait cette chose, ce propriétaire doit s'imputer de ne s'être pas opposé afin de distraire ; le décret a purgé son droit de propriété ; si néanmoins son droit était un de ceux

qui ne se purgent pas par le décret, il pourrait interjeter appel de l'adjudication." (1)

MONDELET, Juge :—Je suis d'avis que le jugement dont est appel doit être confirmé. Ce terrain que Simon Octeau, a, le 8 mai, 1886, acquis de Joseph Guay, fils, a été dûment livré à Octeau qui en a joui publiquement jusqu'au 31 janvier, 1861, qui est le jour que le shérif a vendu l'immeuble en question dans cette cause et revendiqué par l'appelant. Cette vente par le shérif de Québec a eu lieu dans une cause à la poursuite de Catherine Frémont contre le dit Octeau, qui en était alors propriétaire et en possession. L'honorable François Lemieux en devint adjudicataire. L'intimé a acquis ce lot de l'honorable François Lemieux, le 18 avril, 1863, et en a pris possession.

Je ne vois pas à Duncan Patton, l'appelant, l'ombre de droit à ce terrain, supposant même qu'il l'ait acquis de Lucie Guay, attendu que Simon Octeau, soit de son consentement exprès, ou à son vu et su, en est demeuré en possession, et en était publiquement réputé le propriétaire jusqu'à la vente et l'adjudication sur lui qu'en a fait le shérif à l'honorable François Lemieux, et que si toutefois l'appelant y avait un droit de propriété il l'a perdu faute par lui de l'avoir fait valoir par opposition au décret.

N'y eut-il rien de ce qui précède, jamais il n'eut été possible d'exécuter un jugement qui aurait été calqué sur la déclaration du demandeur, dans laquelle, outre qu'il n'y a pas d'allégation de saisine, la description de l'immeuble revendiqué n'indique ni la superficie, ni la figure de la partie du terrain dont il est allégué que le défendeur s'est emparé. J'opine donc pour la confirmation du jugement dont est appel, par lequel a bien et dûment été déboutée l'action de l'appelant, demandeur en Cour de première instance.

La Cour d'appel fut unanime à confirmer le jugement

(1) Pigeau, Procédure Civile, vol. 1, p. 779.—Stats. Ref. du B. C., ch. 85, sec. 4, sous-sec. 3.

prononcé en Cour Inférieure, par TASCHEREAU, Juge, le 4 février, 1865, et dont voici la teneur :

La Cour, etc.—“ Considérant que le trois mai, 1836, par acte fait et passé à la Pointe-Lévis, pardevant J. B. Couillard et son confrère, notaires publics, le nommé Simon Oceau a acquis du nommé Joseph Guay, fils, un immeuble désigné au dit acte comme suit :

“ Un certain circuit de terre, situé à la Pointe-Lévis, première concession du fleuve St. Laurent, au nord du chemin du Roi, étant de forme irrégulière, consistant en ce qu'il peut y avoir de terrain, à partir du ruisseau qui se trouve au sud-ouest de la maison de Sieur F. Lemieux, et courant sur le front du dit chemin du Roi, à la ligne de la terre du dit François Lemieux, excepté un chemin de charrette de six pieds de large, le long de la ligne du dit François Lemieux, que le dit Sieur Guay se réserve à perpétuité pour aller à son moulin à scie et sur la grève; et sur la profondeur qu'il peut y avoir du chemin du Roi à aller au dit ruisseau qui se trouve à passer par le côté nord du dit chemin du Roy, et qui va rejoindre le chemin de charrette, réservé par le dit sieur vendeur, le tout suivant les sinuosités du dit ruisseau. Borné devant au chemin du Roi, au nord-est au dit ruisseau, tel et ainsi que le dit terrain est actuellement avec toutes ses appartenances et dépendances quelconques sans réserve,” et que le dit Simon Oceau a eu tradition du dit immeuble, en a joui publiquement jusqu'au 31 janvier, 1861.

“ Considérant que le 31 janvier, 1861, l'immeuble revendiqué en cette cause, formant partie de celui vendu au dit Simon Oceau par l'acte de cette vente ci-dessus mentionné, a été vendu par le shérif du district de Québec, dans une cause sous le No. 1327, où le dit Simon Oceau était défendeur, et fut adjugé le dit jour à l'Honorable François Lemieux :

“ Considérant que le dit Honorable François Lemieux, a, le 13 juin, 1863, par acte fait et passé à St. Joseph de la Pointe-Lévis, pardevant maître F. M. Guay et son confrère, notaires publics, vendu au défendeur l'immeuble susdit, à lui adjugé comme susdit, par le shérif du district de Québec :

“ Considérant qu'en vertu de la dite vente et adjudication le défendeur a pris possession du dit immeuble et le possède encore :

“ Considérant que le demandeur, Patton, en supposant même qu'il eût un titre valable de propriété au dit immeuble, a constamment laissé le dit Simon Oceau en possession paisible et publique du dit immeuble, et que le dit immeuble a été saisi et vendu par le shérif du district susdit comme lui appartenant, et *de facto* en sa possession :

“ Considérant que le demandeur devait se porter opposant à la saisie et vente du dit immeuble, mais qu'au contraire, il a laissé vendre et adjuger le dit immeuble en justice sans formuler sa plainte et s'opposer à la dite saisie et vente :

“ Considérant que lors de la saisie et vente du dit immeuble par le dit shérif, le dit Simon Oceau était considéré comme propriétaire, et qu'en autant la saisie faite sur lui était valable, et que l'adjudication faite sous de telles circonstances doit même purger les droits du propriétaire, s'il ne s'y est pas opposé :

“ Considérant que la vente judiciaire, accompagnée des formalités légales, doit être respectée, et ne peut être révoquée en doute sans porter atteinte à l'efficacité d'un titre accordé par la main de la justice, la Cour maintient la défense du défendeur et renvoie l'action du demandeur, etc.

CAMPBELL & HAMILTON, pour l'appelant.

CASAUULT, LANGLOIS & ANGERS, pour l'intimé.

COUR SUPERIEURE.—QUEBEC.

SEANCES EN VACANCE.

Présent :—TASCHEREAU, Juge.

No. 115. { HENRY.....Demandeur,
vs.
SIMARD.....Défendeur.

Jugé :—1o. Que la Cour Supérieure, ou un Juge de telle Cour en vacance, a juridiction, en vertu du Stat. Ref. du B. C., chap. 88, de s'enquérir, sur requête libellée présentée à cet effet, de la validité de l'élection d'un directeur d'une banque; en autant qu'une banque incorporée doit être considérée comme corporation publique.

2o. Que le bref de la nature d'un bref de *quo warranto*, émanant en vertu des dispositions du dit Stat. Ref. du B. C., chap. 88, doit être adressé à un huissier de la Cour Supérieure, pour être par lui signifié et rapporté, et non adressé au défendeur dans la cause.

3o. Que, dans l'espèce, les affidavits produits au soutien de la déclaration, ou requête libellée, du demandeur, étaient suffisants.

Held :—1o. That the Superior Court, or a Judge of such Court in vacation, has jurisdiction, in virtue of the Con. Stat. for L. C., cap. 88, to inquire, upon petition, *requête libellée*, presented for that purpose, of the validity of the election of a bank director; inasmuch as an incorporated bank must be considered as a public corporation.

2o. That a writ in the nature of a *quo warranto*, issuing in virtue of the provisions of the said Con. Stat. for L. C., cap. 88, must be addressed to a bailiff of the Superior Court, to be by him served and returned, and not addressed to the defendant in the cause.

3o. That, in the case submitted, the affidavits produced in support of the declaration, or *requête libellée*, of the plaintiff, were sufficient.

• Jugement rendu le 21 mars, 1866.

TASCHEREAU, juge :—

La requête libellée présentée par le requérant, Joseph Wilson Henry, contre le défendeur, George Honoré Simard, est fondée sur le chapitre 88, des Statuts Refondus du Bas-Canada, intitulé : "Acte pour sauvegarder les droits de Corporation et en assurer l'exercice." Par cette requête, le requérant se plaint que le défendeur, Geo. H. Simard, a usurpé et pris sans permission, et continue à détenir et exercer illégalement la charge et franchise de directeur de la banque d'Union du Bas-Canada, corporation et corps politique, incorporé sous ce nom par l'acte du parlement de cette province, 29 Vic., ch. 75, et le requérant conclut à ce que M. Simard soit sommé de comparaître et montrer en vertu de quelle autorité il prétend tenir et exercer la charge et franchise de directeur de cette banque, et à ce qu'il soit par le jugement de cette Cour, dit et déclaré que

le dit G. H. Simard n'a aucun droit légal ou titre à la dite charge ou franchise de directeur de la dite banque, et qu'il en soit dépossédé et exclus, et condamné à payer au receveur général une somme de \$400, comme amende, avec dépens.

La requête est annexée au bref de sommation, adressé au dit G. H. Simard, lui-même, lui commandant de comparaître devant un des Juges de la Cour Supérieure pour le Bas-Canada, le 29 janvier, 1866, pour répondre à la requête libellée ci-dessus énoncée, et le tout fut signifié à M. Simard, le 24 janvier, même année. Le défendeur rencontre cette demande de trois manières :

1° Par une exception déclinatoire.

2° Par une exception péremptoire à la forme.

3° Par une motion demandant que le bref de sommation et la requête soient renvoyés et mis à néant, par suite de l'insuffisance des affidavits produits au soutien de la requête, tel que requis par le chap. 88 des Stats. Ref. du Bas-Canada.

Les prétentions du défendeur sont, en peu de mots, les suivantes, quant à l'exception déclinatoire, savoir : que le chap. 88, ci-dessus mentionné, ne s'applique qu'aux corporations publiques, et non aux corporations privées. Que la Banque d'Union du Bas-Canada est une corporation privée, qu'en Angleterre l'information de la nature d'un *quo warranto* ne s'accordait pas pour obtenir justice contre une corporation privée, au moins à la demande d'un simple individu, quoique le Roi eût le droit d'adopter la procédure, et que ce n'est que dans les Etats-Unis d'Amérique, que cette procédure a été permise à un individu contre des corporations privées, telles que banques, compagnies de chemins de fer, et autres corporations de même nature.

Le défendeur a aussi prétendu que le chap. 88 ci-dessus ne faisait que changer la forme de la procédure, n'était pas introductif d'un droit nouveau, ou en d'autres mots, n'était pas à une corporation de la nature de cette banque

d'Union, les droits que l'on pouvait exercer au moyen du *quo warranto* en Angleterre contre les corporations publiques.

Il n'est pas à ma connaissance que cette question importante ait jamais été soulevée dans ce pays, au moins je n'en vois aucun rapport, et nul doute que si une décision quelconque eût été prononcée sur cette question vraiment importante, et qui n'est pas exempte de difficulté, les savants et habiles avocats de l'un ou de l'autre côté de la cause n'auraient pas omis de la compiler, ni de la citer au soutien de leurs prétentions.

Il me faut rencontrer la question comme question nouvelle devant nos tribunaux jusqu'à ce jour, et la résoudre à l'aide, tant de notre législation provinciale, qu'à l'aide de la loi impériale, et des mille et un précédents anglais que l'on peut citer sur la matière, et des autorités des commentateurs américains.

Il faudra voir : 1° Si, avant notre législation particulière, introduite par le chap. 88 des Stats. Refondus du B. C., un simple particulier pouvait obtenir une information de la nature d'un bref de *quo warranto* pour les mêmes causes que celles énoncées en la requête actuelle. 2° Si notre législation même ne va pas plus loin, et ne favorise pas plus l'exercice du bref, en ne distinguant pas entre corporations publiques et privées, et si la franchise que possède la Banque d'Union par sa direction est un de ces droits légaux dont l'usurpation illégale donne droit à l'obtention d'une information de la nature d'un *quo warranto*.

Il faut poser pour base de notre examen qu'avant l'existence de notre loi provinciale consacrée par le chapitre 88 de nos Stats. Ref. B. C., la loi anglaise nous gouvernait exclusivement sur la question de l'émanation d'un tel bref, sur la manière et les conditions de son émanation. Le statut 4 et 5 William & Mary, chap. 18, et la 9 Anne, chap. 20, étaient l'autorité sur la matière, mais indépendamment

de ces statuts, en vertu de la loi commune, les tribunaux avaient le droit d'accorder à un individu une information de la nature d'un *quo warranto*, sur demande qu'il en faisait en alléguant l'usurpation d'une franchise au détriment du public. Ce droit était discrétionnaire dans le juge qui pouvait l'accorder ou le refuser suivant les circonstances, et suivant l'intérêt que le requérant montrait ainsi en la question, et l'on voit que dans plusieurs cas les tribunaux ont refusé à un simple particulier l'information demandée, le laissant à exercer son recours au moyen du procureur-général qui devait alors lui-même faire la demande en son nom, et suivant sa discrétion. On voit quelques exemples de cette discrétion des tribunaux à accorder ou refuser cette information dans le 14e vol. Law Library; et à la page 118 de Cole on Criminal informations, on retrouve les paroles du Juge-en-Chef, Lord Hardwicke, savoir: "Que la Cour faisait cette distinction, d'accorder l'information pour usurpation publique, mais que si l'usurpation n'était que d'une franchise privée, ne concernant pas le gouvernement public, la Cour avait quelquefois refusé l'information, et ordonné que la demande s'en fit au procureur-général;" pour me servir du langage du Juge-en-Chef Tilghman, rapporté par Angell et Ames à la page 694 de leur ouvrage sur les corporations, Lord Hardwicke ne nie pas le droit de la Cour d'accorder cette information, mais au contraire il consacre ce droit. La même citation d'Angell et Ames établit l'existence de ce droit aux Etats-Unis d'Amérique comme consacré par les décisions des tribunaux de la république, et rapporte encore les paroles du même Juge Tilghman en prononçant jugement dans la cause citée, savoir: "Je ne trouve aucun exemple d'une information de la nature d'un *quo warranto* en Angleterre, excepté dans le cas de l'usurpation de la prérogative du Roi, ou d'une de ses franchises, ou lorsque le public ou au moins un grand nombre de personnes sont intéressés;" et après avoir cité le cas des banques, chemins à barrières, canaux, compagnies de ponts, qui, quoique dénommés corporations

privées, sont cependant d'une nature publique, il termine en disant : " J'incline fortement vers l'opinion que dans tous les cas où il existe une charte, et lorsque la question s'élève concernant l'exercice d'une charge réclamée en vertu de cette charte, la Cour peut, dans tous ces cas, dans sa discrétion, accorder l'information de la nature du *quo warranto*, parceque dans tous ces cas, quoique qu'on ne puisse pas strictement dire que la prérogative de l'état a été usurpée, cependant, ce qui est à peu près la même chose, le privilège accordé par l'état a été mal exercé. Celui contre qui l'information est demandée ne tient ses droits que de l'état, (ou de la loi) et un droit non fondé est une usurpation (sous prétexte d'une charte) d'un droit qui ne lui fut pas accordé." Au même ouvrage de Cole, p. 162, on voit que de semblables informations furent accordées contre les personnes qui dans un cas, réclamaient l'exercice de la charge de " Master of the Fellowship of the Patten Makers' Company of the city of London, Master of the Merchant Tailors' Company in London, Master of the Company of Coopers of London ;" ou le cas de celui qui demandait à être membre " of the Company of Tailors in Lichfield ;" car, dit M. Cole, ces charges sont liées aux franchises politiques. Soit dit en passant, que par l'acte d'incorporation de la Banque d'Union du Bas-Canada, elle est instituée et déclarée corporation et corps politique, avec succession perpétuelle, sujet aux dispositions du chapitre 54 des Statuts Refondus du Canada, intitulé, " Acte concernant les Banques Incorporées," et aux dispositions de l'acte de la 24 Vict. chap. 28, avec pouvoir général et commun à toutes banques d'émettre des billets, etc., etc., et sous la réserve que tous les pouvoirs et privilèges confiés à cette banque soient sujets à toute législation future du parlement, et que l'acte créant cette banque est un acte public.

Quelle est la nature de la corporation en question en cette cause : Est-elle strictement publique ou privée ? Pour résoudre cette question, voyons comment elle a été con-

stituée, dans quel but, quels sont ses attributs, ses privilèges, ses obligations, ses devoirs, vis-à-vis l'état et les citoyens en général. Comme nous l'avons vu, la Banque d'Union du Bas-Canada, a été incorporée par l'acte 29 Vict., chap., 75, et déclarée être corporation et corps politique, avec succession perpétuelle, un sceau social, pouvant poursuivre et être poursuivie comme les autres corporations, pouvant acquérir des biens meubles et immeubles pour l'administration de ses affaires, n'excédant pas la valeur annuelle de \$10,000, devant procéder de certaine manière à l'élection des directeurs, qui choisiront un président et vice-président, qui occuperont leurs charges pendant une année, les directeurs devant être domiciliés en cette province et être sujets britanniques, et être élus en la manière et après l'observation des formalités prescrites par l'acte, devant pourvoir au remplacement de ses directeurs, et fixant le mode de l'élection, la convocation des assemblées, le quorum des directeurs, obligeant les directeurs à faire des dividendes semi-annuels, prohibant l'émission d'aucun billet, avant que \$100,000 ne seraient déposées, fixant à Québec le siège des affaires, limitant à certaines transactions celles que la Banque pourra faire, limitant le montant des billets à émettre ainsi que le taux des escomptes, permettant la retention d'un droit d'escompte sur billet, annulant la charte de la Banque et ses privilèges dans le cas de suspension de paiement, fixant au double des actions des actionnaires leur responsabilité individuelle, obligeant la banque à fournir des états des affaires de la Banque aux actionnaires, dont copie au gouverneur de la province, prohibant de prêter à des puissances étrangères à peine de dissolution, soumettant à une législation future l'acte d'incorporation ainsi que les pouvoirs et privilèges qu'il confère, et enfin déclarant l'acte un acte public.

Nous trouvons dans Grant on Corporations (page 9, chiffre de parenthese,) la définition du caractère privé ou public des corporations, en ces mots : " Private corporations are " where a body of traders, or a scientific or other society

"aiming only at objects of their own, and not contempl-
 "ing the conferring any immediate benefit on the public,
 "or the taking upon themselves any public government,
 "duty, or responsibility, are incorporated by charter. Such
 "body, however, if incorporated by public acts of parlia-
 "ment, must be regarded as a public corporation. Public
 "corporations are such as are established, (mostly of late
 "years by act of parliament) to serve great purposes of
 "state, and holding out advantages and benefit, either to the
 "public without restriction, or to every one who chooses
 "to comply with their conditions. Such are the Bank of
 "England, the East India Company, the Railway, Light,
 "Water, Coke, and other companies, the Hudson Bay Com-
 "pany, the Universities and other bodies. Free or public
 "schools, though founded by charter, seem to be public
 "corporations. To this class seem to belong all ecclesias-
 "tical corporations, whether sole or aggregate."

Nous voyons à la page 697 d'Angell et Ames on Cor-
 porations, ce que veut dire le mot *Franchise*, savoir, c'est
 un mot d'une signification très-étendue et est définie par
 Finch être un privilège royal entre les mains d'un sujet.
 En Angleterre, un privilège entre les mains d'un sujet,
 que le Roi seul accorde, est une franchise. En Amé-
 rique, assumer un pouvoir que l'on ne peut exercer sans la
 permission de l'état, ou s'immiscer dans la charge d'une
 corporation privée, contrairement au statut qui la crée, c'est
 dans un sens large, s'emparer de la prérogative royale,
 s'emparer de ou violer une franchise du souverain.

Et, je le demande, ne trouvons-nous pas dans le cas
 actuel une analogie frappante avec les cas énoncés dans
 les autorités ci-dessus; en effet, il suffit de dire qu'il s'agit
 d'une banque incorporée, institution monétaire revêtue
 d'un pouvoir extraordinaire qui ne réside que dans le
 souverain, celui d'émettre des billets de banques, équiva-
 lant presque à celui de battre monnaie, sous certaines condi-
 tions il est vrai, mais toujours en vue du bien public, du

commerce des nations. Cette banque contracte ou fait contracter par ses directeurs, tant vis-à-vis de l'état que vis-à-vis des actionnaires, des dépositaires et du public en général, une responsabilité très-grande, et ne peut-on pas dire que la législature en accordant à cette banque le droit d'exercer le commerce de banque, d'émettre des billets, n'a pas accordé une franchise, un privilège royal, et ne peut-on pas dire que l'introduction illégale d'un membre sous nom de directeur de cette corporation ne serait pas jusqu'à un certain point une violation de la franchise ou du privilège conféré au sujet par l'autorité souveraine. Je n'en puis douter un instant, et quel serait le remède en supposant que l'information dans la nature du *quo warranto* n'existât pas, je n'en puis concevoir un seul, à moins que ce ne fût la ridicule action en dommages intentée par qui et sur quoi fondée ? Si les dommages sont la base de l'action, les tribunaux n'en pourraient accorder que sur preuve positive, et cependant l'intrus resterait toujours au pouvoir comme directeur, conduisant à sa guise, et dans son intérêt très-probablement, une institution monétaire lui rapportant, sous mille formes, un montant plus que suffisant pour payer les dommages qu'il pourrait être condamné à payer.

La législature en accordant cette franchise dont elle s'est dessaisie dans l'intérêt de tout un public, n'a pas voulu se dessaisir des droits qu'elle a de punir celui qui violerait entre les mains du sujet, une franchise qu'elle lui a accordée. Elle a dû vouloir accorder à ce sujet l'accessoire en lui accordant le principal ; le principal est la charte, la franchise ; et l'accessoire est le moyen légal de conserver cette franchise, et de la revendiquer au moyen d'un bref de prérogative contre tout individu qui l'usurperait.

Je pourrais citer un grand nombre de cas analogues à ceux cités plus haut, pour démontrer que, par la loi, telle qu'interprétée en Angleterre, on eût pu en le Bas-Canada adopter dans un cas semblable à celui-ci, une procédure

consistant dans une information de la nature d'un *quo warranto*, à la demande d'un simple individu, mais celles que j'ai citées suffisent pour le moment. J'avoue que de la part du défendeur il a été cité plusieurs autorités qui à première vue sembleraient militer en faveur de la doctrine contraire, et entre autres, la cause de Rex et Ogden et autres, rapportée au 10me vol. de Barnewall et Creswell's reports, mais dans ce cas, il s'agissait d'une information de la nature d'un *quo warranto* demandée à l'encontre du défendeur et autres, qui prétendaient être une corporation d'une nature exclusivement privée et non reconnue avoir aucune existence. Et il fut prétendu que l'information devait être prise à la demande du procureur-général, et non à la demande d'un particulier ; que le statut 9 Anne, chap. 20, ne s'étendait qu'aux individus usurpant une charge ou franchise dans une corporation quand le droit de la corporation comme corps était reconnu, et que dans ce cas là il s'agissait de l'existence de la corporation, et non de l'usurpation d'un membre. Il fut aussi prétendu que les individus susdits ne prétendaient pas être membres d'une corporation d'une nature publique, et qu'au contraire la franchise usurpée n'était en aucune manière liée au gouvernement public : on voit dans le rapport de cette cause que des précédents contraires furent cités pour faire voir que même sous de semblables circonstances, les tribunaux avaient accueilli de semblables informations au nom d'un particulier. Le prononcé du jugement établit par la bouche de Lord Tenterden, que l'information étant contre une corporation entière, n'ayant aucune existence légale, ne pouvait être demandée que par le procureur-général. Le juge Bayley s'est, dans ce cas, contenté de dire qu'il n'y avait pas d'exemple que la Cour eût accordé une information de la nature d'un *quo warranto* contre des personnes usurpant une franchise d'une nature exclusivement privée, et nullement liée au gouvernement public. Le rapport de cette cause fait voir à sa face la différence entre ce cas-là et celui qui nous occupe,

car dans un cas il s'agit de faire déchoir une corporation entière n'ayant aucune existence légale de l'aveu de tout le monde, et qui était d'une nature exclusivement privée, et dans le cas présent il s'agit de demander à une personne en vertu de quel droit elle a usurpé la charge ou franchise de directeur d'une banque établie par acte public, dûment incorporée, dûment reconnue, jouissant de droits et privilèges royaux, intimement liée avec le public et le monde entier, et ayant contracté des droits et responsabilités extraordinaires, tant envers ses actionnaires qu'envers le monde entier.

Une autre cause fut citée comme précédent au soutien des prétentions du défendeur, tiré de la cause de *Rex vs. Ramsden* et autres, rapportée au 3 vol. d'Adolphus et Ellis. Qu'il soit dit en commençant que le jugement en cette cause ne fût entièrement approuvé que par les juges Littledale et Pateson, et que le juge-en-chef Denman, tout en concourant dans le jugement, afin, disait-il, de ne pas causer de délai aux intéressés, déclara qu'il avait de grands doutes sur une question semblable, et cela en l'année 1835, après cent vingt-cinq ans de précédents pour et contre la question en litige. Mais, en examinant attentivement le rapport de cette cause, on remarque que, suivant les prétentions des défendeurs, leur corporation n'existait pas, et que leur incorporation n'était pas de la nature d'une charge publique, et n'était nullement liée à aucune franchise de la couronne, et que ce n'était qu'une substitution à une charge de marguilliers et inspecteurs, et on sait qu'en Angleterre on n'a jamais voulu accorder l'information pour la charge de marguilliers, tandis que, soit dit en passant, dans le Bas-Canada, on n'en a jamais fait difficulté dans nos tribunaux, et que le principe a été consacré par grand nombre de procédures sous forme de *mandamus, quo warranto*, et requête libellée telle que la présente. Néanmoins, le rapport de cette cause est probablement le précédent le plus fort que j'aie vu au soutien de la prétention du défendeur actuel, cependant le doute exprimé par le juge-en-

chef Denman, et les circonstances de la cause m'ont induit à regarder cette décision comme extrême, pour ne pas dire plus.

Un troisième précédent cité par la défense est celui tiré de *Regina vs. Monsley*, rapporté au vol. 8 (Queen's Bench) *Adolphus & Ellis*. Ce cas est, suivant moi, très-faible en faveur du défendeur. Il ne s'agissait dans cette dernière cause, que de faire exécuter, au moyen d'une charte royale, les conditions d'un legs pieux fait par un particulier; et le motivé du jugement est que la charge en question était celle de gouverneur d'un hôpital fondé par le testament d'un particulier, n'ayant aucun devoir ni juridiction publiques quelconques, malgré qu'une charte eût été obtenue pour incorporer les membres de l'institution, ce qui était (suivant le juge) parfaitement inutile vu que la couronne n'ajoutait rien à l'institution, et ne s'y était réservé aucun contrôle. Je crois donc qu'avant la loi de ce pays, introduite par la 12 Vict., chap. 41, un simple particulier eût pu obtenir une information de la nature d'un *quo warranto* pour des causes analogues à celles que mentionne la requête en la présente cause.

Passant au second point, qui est celui de savoir si notre loi, consacrée par le chap. 88 de nos Stat. Ref. B. C., ne va pas plus loin que la loi qui nous régissait avant la 12 Vict. chap. 41, refondue dans le chap. 88, et si de fait elle ne favorise pas plus la procédure de l'information de la nature d'un *quo warranto* que ne faisait notre antique loi anglaise, en un mot, s'il y a distinction à faire entre les corporations publiques et privées dans l'obtention du bref mentionné au chapitre en question, et si la franchise que possède la Banque d'Union du Bas-Canada, par ses directeurs, est un de ces droits royaux dont l'usurpation illégale donne droit à l'obtention du bref en question.

Nul doute, dans mon humble opinion, que le législateur qui a préparé le projet de la 12 Vict. chap. 41, n'ait en

grande partie pris pour base de son projet les statuts 4 et 5 W. & M., chap. 18, et 9 Anne, chap. 20. On remarque même une grande similitude dans la phraséologie des uns et des autres, et il ne pouvait en être autrement. Mais je crois que notre statut est plus clair, plus positif et définit mieux la position, et ne prête pas à tant de commentaires et d'opinions différentes qu'offrait la loi ancienne fondée sur ces deux statuts impériaux. Le langage de notre législation est si simple qu'il me semble pouvoir être compris de prime abord sans aucune difficulté. Repétons les termes : "Quand une personne usurpe, prend sans permission, ou tient ou exerce illégalement une charge publique, ou une franchise dans le Bas-Canada, ou une charge dans aucune corporation ou autre corps ou bureau public, que telle charge ait été créée ou qu'elle existe en vertu d'aucun statut ou ordonnance, ou en vertu de la loi commune du Bas-Canada." Les savants avocats de la défense ont admis que la 12 Vict., chap. 41, n'introduisait pas un droit nouveau, mais changeait seulement la manière d'exercer ce droit. Les savants avocats de la poursuite, au contraire, ont prétendu que la 12 Vict. ne distinguait pas entre les corporations privées et les corporations publiques, et que dans tous les cas l'usurpation d'une franchise quelconque donnait lieu au remède par voie de requête sous forme de *quo warranto*.

Je ne vois rien dans le préambule, ni dans les sections suivantes de la 12 Vict., ch. 41, réglant l'exercice de l'information de la nature du *quo warranto*, dont on puisse inférer que cette nouvelle législation ait, quant au droit de demander l'information, ajouté rien, ni diminué rien du droit qui existait, suivant moi, avant la passation de cette 12 Vict., chap., 41, refondue dans le chap., 88, de nos statuts refondus. Elle n'a eu que l'effet : 1° de rendre plus claire l'interprétation des cas dans lesquels l'information de la nature du *quo warranto* peut se demander et s'accorder ; 2° de fournir le mode de procédure à observer à l'égard de la demande, de l'action ou bref, et de la défense du défendeur.

En effet, quoique au commencement du préambule de ce statut il soit énoncé que le but de cette loi était de protéger les droits de corporation, sans distinguer entre les corporations publiques ou privées, cependant la suite du préambule limite aux charges publiques, à une franchise dans le Bas-Canada, ou une charge dans aucune corporation ou autre corps ou bureaux publics, les cas dans lesquels l'information peut se demander. Je ne vois dans l'énonciation de ces divers cas, rien qui différencie la loi actuelle de celle qui nous régissait comme venant de l'Angleterre, et notamment du statut 9 Anne, chap., 20, si ce n'est que le mot *Franchises* est employé généralement et sans limitation. Je n'en conclus pas que toute franchise, privée ou publique, soit par là déclarée soumise à la juridiction de ce tribunal, mais que la franchise dont il est question en ce préambule est de la nature de celles accordées par la couronne ou le parlement à un particulier, et dont l'usurpation et violation donnerait droit à la procédure actuelle, indiquée par le chap. 88 de nos Stat. Ref. du Bas-Canada. Encore une fois, qu'est-ce qu'une franchise? On trouve la réponse à cette question à la page 450 du 3e vol. de Kent's Commentaries, en ces mots remarquables: "Franchises are certain privileges conferred by grant from government, and vested in individuals. In England they are very numerous, and are understood to be royal privileges in the hands of the subject. They contain an implied covenant on the part of government, not to invade the rights vested, and on the part of the grantees to execute the conditions and duties prescribed in the grant. Corporations, or bodies politic, are the most usual franchises known in our law: Special privileges conferred upon towns and individuals in a variety of ways, and for numerous purposes, having a connexion with the public interest, are franchises." On voit au 2e vol. de Blackstone's Commentaries, p. 37, une définition entre autre du mot franchise. "Franchise and liberty are used as synonymous terms, and their definition is, a royal privilege, or branch

" of the king's prerogative, subsisting in the hands of a
 " subject..... It is likewise a franchise for a number of
 " persons to be incorporated, and subsist as a body politic;
 " with a power to maintain perpetual succession and do
 " other corporate acts: and each individual member of such
 " corporation is also said to have a franchise or freedom."

D'après ces autorités, la Banque d'Union du Bas-Canada jouissait, suivant moi, d'une franchise, c'est-à-dire, d'un privilège royal, consistant dans son incorporation par acte du parlement, avec le privilège du commerce de l'argent sous certaines conditions, avec responsabilités et obligations tant envers le gouvernement qu'envers les particuliers et ses actionnaires, et ayant des rapports intimement liés avec l'intérêt du public. D'après Blackstone le fait seul d'être incorporé comme corps politique, une succession perpétuelle et le droit de faire des actes inhérents à une corporation, et en nom collectif, constitue une franchise tant pour la corporation elle-même que pour chaque membre de cette corporation. Sous ce point de vue, je dois dire que la charge de directeur de la Banque d'Union du Bas-Canada est une franchise soumise aux dispositions du chap. 88 des Stats. Ref. B. C., et que le défendeur ne peut décliner la juridiction de cette Cour dans l'adjudication de la plainte portée contre lui en conformité à ce chapitre.

Maintenant je dois aborder la question de l'exception à la forme produite par le défendeur, et dans laquelle il prétend ne pas être obligé de répondre à la requête et au bref à lui signifiés, parce que le bref de sommation à lui signifié aurait dû être adressé à un huissier de cette Cour, et non pas directement au défendeur; parce que le bref signifié oblige le défendeur de comparaître à une heure indiquée à un certain jour, tandis que le défendeur aurait par la loi toute la journée pour comparaître.

La procédure à suivre en cette matière est indiquée en le préambule du chap. 88 des Stats. Ref. B. C., qui énonce

que la Cour pourra ordonner l'émission d'un bref commandant que la personne dont on se plaint soit assignée à comparaître devant la Cour pour répondre à la déclaration ou requête libellée tel jour que le juge trouvera à propos de fixer, et dans tous les cas le bref d'assignation sera signifié à la personne contre laquelle plainte est ainsi portée, en en laissant une copie, ainsi que de la déclaration ou requête libellée, soit à elle-même en personne ou à son domicile, en la manière d'usage dans les actions ordinaires.

J'ai constaté que la pratique à Montréal est d'adresser le writ à un huissier comme dans une action ordinaire, pour être par lui signifié, conformément à la sect. 3 du chap. 83 des Stats. Ref. B. C., et d'après une lettre de M. Honey, un des Protonotaires de la Cour Supérieure à Montréal, telle aurait été la pratique invariable à Montréal depuis la 12 Vic., ch. 41, et même sur l'objection prise, serait intervenue une décision formelle dans ce sens prononcée par M. le juge Berthelot et confirmé en appel. J'avoue que je n'ai pas compulsé ces décisions, que je ne vois pas dans nos rapports judiciaires. Une pratique contraire existe également à Québec, et une décision formelle à ce sujet, prononcée par feu M. le juge Chabot dans la cause No. 757, Dussant vs. Giroux, en 1858, irait à établir que la formule d'un bref adressé à la personne même, et signifié par un huissier, était légale ; et, en effet, ce savant Juge a renvoyé une exception à la forme, produite par le défendeur Giroux, qui alléguait être mal assigné, en autant que le bref lui était adressé au lieu de l'être à un huissier avec injonction de l'assigner. Le jugement du savant Juge n'est pas motivé, et renvoie purement et simplement l'exception à la forme.

Sur huit ou neuf causes, dans le district de Québec, que le Protonotaire m'a fourni, je trouve la même forme observée, savoir, celle d'adresser le writ au défendeur, mais l'objection n'a été prise dans aucune.

Entre ces deux pratiques différentes, dans deux districts régis par les mêmes lois et le même code de procédure, il est assez difficile de se rendre compte de cet état de choses, mais toujours il existe.

Voyons quel est celui qui semble le plus conforme à la loi.

Par le chap. 88, sec. 1, des Stat. Ref. du B. C., le writ doit être émané de la Cour Supérieure, or, d'après le chap. 88, sec. 3, des Stat. Ref. du B. C., il est pourvu que tout writ émanant de la Cour Supérieure sera adressé à des huissiers ou aux shérifs, suivant les divers cas indiqués. La loi 12^e Vict., chap. 41, est devenue loi un instant après la 12^e Vict., chap. 88, refondue dans le chap. 88, et on doit naturellement conclure que le législateur en prescrivant l'émission d'un bref de sommation de la Cour Supérieure, a dû avoir en vue un bref dans la forme prescrite par la 12^e Vict. chap. 88. D'ailleurs le texte indique, suivant moi, que le bref doit être adressé à un autre que le défendeur, puisqu'il est dit *qu'il émanera un bref commandant que la personne soit assignée à comparaître pour répondre*. Si on réfère à la sous-section 2 de la section 9 du même chapitre, on voit que dans le cas où il faudra assigner une corporation, ou un nombre de personnes dont on se plaint, dans le but de faire déclarer cette corporation déchue de ses droits; le bref devra dans ce cas être adressé à la corporation même, ou aux personnes dont on se plaint. Est-ce que la règle *qui dicit de uno negat de altero*, ne reçoit pas son application en la présente cause? En effet, pourquoi la législature aurait-elle dit dans un cas, *vous prendrez un writ qui commandera que la personne soit assignée à comparaître*, et dans l'autre *vous prendrez un writ commandant à la dite personne de comparaître*, si dans le premier cas la législature n'avait pas eu l'intention d'ordonner l'émission d'un bref ordinaire, et comme dans une action ordinaire, adressé à un huissier, et dans l'autre d'ordonner l'émission d'un bref extraordinaire commandant aux personnes de compa-

raître pour répondre. Quel but a eu le législateur en faisant cette distinction ? Il serait assez difficile de le dire, puisque l'un ou l'autre de ces brefs aurait rempli l'objet d'assigner le défendeur.

Si on réfère aux brefs de sommation émanés avant la 12 Vict., ch. 38, on trouve qu'ils ont tous été adressés à l'officier chargé d'assigner le défendeur, à l'exception des brefs de prérogative royale, qui, avant la 12 Vict., ch. 41, s'adressaient aux personnes même conformément à l'usage anglais. Je suis donc d'opinion que le bref de sommation est irrégulièrement adressé, qu'il aurait dû être adressé à un huissier pour être par lui signifié et rapporté, et en conséquence je déclare le défendeur mal assigné, je maintiens l'exception à la forme et renvoie la requête libellée. Il a été fait une objection que le bref obligeait le défendeur à comparaître le 29 janvier, 1866, à onze heures du matin, lorsque, par la loi, le défendeur avait toute la journée pour comparaître. Cette objection n'a aucune valeur, parceque le défendeur, assigné le 24 pour répondre le 29, à onze heures du matin, a eu ses trois jours francs pour répondre, c'est-à-dire qu'entre l'assignation et le rapport il y a eu 4 jours francs, plus deux demi-journées. Il en eût été autrement si le bref n'eût été signifié que le 26.

Je regrette que cette décision doive retarder la question importante, la seule qui, suivant moi, aurait dû être soulevée et plaidée, savoir, celle de savoir si l'élection dont on se plaint est entachée ou non d'illégalité, ou plutôt si le défendeur a été légalement élu ou non.

Il me semble que dans une cause de cette nature, on aurait pu ajourner, pour d'autres causes, les objections à la forme et techniques faites par le défendeur, et qu'on aurait mieux fait, dans l'intérêt de tous, de rencontrer de front la seule question en litige. Comme juge, je devais adjuger sur toutes les questions de forme qui me furent soumises, et j'ai rempli ma tâche.

Le jugement maintenant l'exception à la forme me dispense d'adjuger sur le troisième et dernier chef de défense, qui consistait à dire que les affidavits sur lesquels la requête libellée était fondée, étaient insuffisants; mais, pour ne rien laisser d'indécis, je dois de suite déclarer, qu'après un examen sérieux de cette dernière exception, je n'y trouve rien qui pût m'engager à prononcer l'insuffisance de ces affidavits, et, qu'au contraire, je les estime suffisants, et j'aurais ordonné que le défendeur eût à répondre à la requête, sans la fatale irrégularité qui se rencontre au bref de sommation. En conséquence de tout ce que dessus, l'exception déclinatoire est renvoyée avec dépens, la motion pour casser le bref est également renvoyée avec dépens, et la requête est également renvoyée, mais sans dépens, vu la circonstance que la pratique en le district de Québec, quoique vicieuse, justifiait, en quelque façon, le demandeur à procéder en la manière et forme par lui adoptées.

CASAUT, LANGLOIS et ANGERS, procs. du demandeur.

STUART, C. R., et ALLEYN, C. R., Conseils.

HOLT et IRVINE, procs. du défendeur.

LELIEVRE et CARON, Conseils.

BANC DE LA REINE, } DISTRICT DE MONTRÉAL.
EN APPEL.

Présents :—DUVAL, Juge-en-Chef, AYLWIN, DRUMMOND,
et MONDELET, Juges.

BLACK, *et al.*.....*Appelants.*

et

LEFEBVRE.....*Intimé.*

Jugé :—Que dans un cas d'abordage le bâtiment qui est dans une position contraire aux règlements, ne peut réclamer les dommages soufferts par suite de tel abordage.

Held :—That in a case of collision the vessel in a position contrary to rule, cannot claim damages suffered from such collision.

Jugement rendu le 8 mars, 1866.

La poursuite en Cour de première instance était en dom-

mages, résultant d'un abordage, par suite duquel la barge de l'intimé, qui se trouvait à l'entrée supérieure du canal de Lachine, avait été coulée à fond par le steamer *Whitby*, appartenant aux appelants, dans les circonstances suivantes :

Le 9 novembre, 1861, l'intimé voulant quitter Lachine avec sa barge, le vent manqua tout à coup et la barge fut ramenée par la force du courant dans le canal, et y descendit jusqu'à la distance d'environ six cents pieds de l'embouchure. L'intimé dit que les employés de la barge s'étaient mis en mesure de la rapprocher du quai, lorsqu'ils aperçurent le bateau à vapeur *Whitby*, venant dans la direction du canal à une distance d'un mille. Ils firent des signaux pour avertir l'équipage du vapeur, qui, néanmoins, continua sa marche sans ralentir sa vitesse jusqu'à ce qu'il arrivât à quelques pieds de la barge. L'intimé prétendait aussi que l'équipage du vapeur pouvait éviter l'abordage, sans risque ni danger pour ce vaisseau, soit en ralentissant sa marche ou en déviant de sa route de quelques pieds.

L'intimé prétendit encore que le chenal du canal avait cent pieds de largeur à l'endroit où était arrêtée la barge, qui occupait le milieu du chenal, et n'ayant que 28 pieds de long, il restait à l'avant et à l'arrière un espace assez large pour permettre au vapeur de suivre sa course. Il alléguait de plus, négligence et malice de la part des employés du vapeur, et concluait à une condamnation contre les défendeurs pour les dommages qu'il avait soufferts.

La défense s'appuyait sur le fait que la barge était en travers du chenal, qu'elle obstruait, et que l'abordage avait été causé par la négligence grossière de ceux qui la montaient, et que les employés du vapeur avaient fait tout ce qui était en leur pouvoir pour empêcher l'abordage.

Il fut établi que la barge avait plus de quatre-vingt-

dix pieds de long ; que le vapeur, d'une valeur considérable, ne pouvait, à raison de la position de la barge, dévier de sa course sans risque et sans danger, tant pour le bâtiment que sa cargaison et ses passagers, et il s'appuyait sur plusieurs décisions établissant que lorsqu'un bâtiment se trouve dans une position contraire aux règlements, il doit supporter les avaries qui lui résultent d'abordage. (1)

La Cour Supérieure rendit le jugement qui suit :

“ The Court, &c.—Considering that the said plaintiff hath fully proved the material allegations of the declaration by him filed, and that he was, on or about the 9th day of November, 1861, the owner and proprietor of the barge called the *Quebec*; and that on the said day and year aforesaid the said defendants were proprietors of the steamer called the *Whitby*, then navigating the River St. Lawrence; and that on the day and year aforesaid the said steamer, then navigating the Lachine canal, did come into collision with the said barge, called the *Quebec*, and did inflict very serious damage and injury to the said barge, called the *Quebec*, by reason of which the said barge did, notwithstanding all exertion, sink; and further considering that the said barge, although in the channel of the said canal and crossing over to the wharf, was in the way of the steamer entering the said canal, yet it is sufficiently and clearly proved that it was by an accidental falling off of the wind, which rendered her stationary for the time being, and the said barge was using all endeavors to get out of the channel on her way to the said wharf; and further considering that the crew of the steamer *Whitby* could well see for a long time the said barge so crossing over, and this for a distance of at least a mile; yet the said crew and those in command of the said steamer did continue on their course without slackening the speed of the said steamer, and although it is clearly established by persons wholly

(1) *Leger vs. Jackson*, 3 Jurist, 225 :—*Bertrand vs. Dickinson*, jugé à Montréal, 28 février, 1862, et une autre cause de *Tate vs. Torrance*.

disinterested, that there was ample room to enable the said steamer to pass the said barge without injury, the channel being for that purpose wide enough, and in full day-light, yet the said persons in charge of the said steamer did negligently and without using any precaution, and not keeping a sufficient look-out, run into the said barge, and did inflict great and serious injury to the said barge, by reason of which the said barge became wholly useless to the said plaintiff, until completely repaired, &c. "

Judgment for £130.

La Cour d'appel appréciant différemment la preuve faite, a jugé en faveur des appelants, comme suit :

The Court, &c.—“ Considering that it appears by the evidence adduced in this cause that on the 9th day of November, 1861, when the steamer *Whitby*, mentioned in the pleadings, came in collision with the barge *Quebec*, also mentioned in the pleadings, the said barge (which was 90 feet in length) was lying in the Lachine canal, and directly across the channel generally used by vessels such as the *Whitby*, when deeply laden, as that vessel then was ; and that the said barge had drifted into the said position partly in consequence of the said barge being insufficiently equipped, and partly in consequence of the unskilful management of the said barge by the persons in charge thereof : And considering that in consequence of the position in which the said barge was then lying with reference to the entrance to the said canal, and the currents there, it was not possible for the persons in charge of the said steamer to stop her in time to avoid the said collision ; and that they are proved to have done all that was in their power to do for that purpose : And considering also that at the time of the said collision there was not sufficient room for the said steamer to pass to the right of the said barge, that is to say, between the barge and the pier ; and further that the persons in charge of the said steamer

could not have attempted to pass to the left, that is to say, the rear of the said barge, without deviating from the channel generally used by vessels such as the said steamer, when laden as she was; and that such attempt would have been attended with great risk of the vessel getting into shoal water and among boulders, and therefore, that the persons in charge of the said steamer are not blamable for the said collision. Doth in consequence reverse the judgment rendered in this cause on the 30th day of April, 1864, and dismiss the action with costs. Honorable Judge MONDELET, dissenting.

CROSS & LUNN, pour les appelants.

LORANGER & LORANGER, pour l'intimé.

COUR DE CIRCUIT.—QUÉBEC.

Présent:—TASCHEREAU, Juge.

No. 801.	{	DASYLVA, <i>et al</i>	<i>Demandeurs.</i>
		DUFOUR.....	<i>Défendeur.</i>

vs.

Jugé:—1o. Qu'un écrit constatant seulement qu'une personne doit une certaine somme à une autre, n'est pas négociable comme billet.

2o. Que l'acceptation d'un billet promissaire par un créancier des mains de son débiteur, n'opère pas une novation de sa créance, et qu'il peut toujours porter une action sur la dette originaire.

Held:—1o. That a writing merely certifying that a person is indebted unto another in a certain sum of money, is not negotiable as a promissory note.

2o. That the acceptance of a promissory note by a creditor from his debtor, does not effect a novation of his debt, and that he can always bring his action upon the original debt.

Jugement rendu le 25 avril, 1866.

L'action en la cause était portée pour marchandises, vendues et livrées au défendeur, au montant de £15, et sur billet promissaire de £14 14 8, consenti par le défendeur aux demandeurs.

Le défendeur, dans une exception péremptoire en droit perpétuelle, confessa jugement pour £14 14 8, montant du billet, et plaida paiement et novation des £15, disant avoir

remis aux demandeurs un billet promissoire de la municipalité de Chicoutimi, conçu en ces termes :

“ Bureau du conseil municipal du township de Chicoutimi, Chicoutimi, 10 octobre, 1862.

“ Je soussigné certifie que le conseil local du township de Chicoutimi doit à Job Dufour, la somme de soixante dollars, payable dans le courant de février prochain.

(Signé.)

Thos. Boily,

Sec.-Trésorier.”

Les demandeurs, par leurs répliques spéciales à cette exception, disaient que l'écrit plus haut était improprement qualifié de billet promissoire, et qu'il ne leur avait été remis par le défendeur que pour leur inspirer plus de confiance en sa solvabilité, et les induire à lui avancer des marchandises à crédit, et ils niaient que par là le défendeur eut fait aucun paiement ou novation de sa dette.

Les prétentions des demandeurs furent maintenues, la Cour rendant jugement comme suit :—

“ Considérant qu'il apparaît que le seul billet ou reconnaissance, à part celui de £14 14 8 qui aurait été livré par le défendeur aux demandeurs, serait une reconnaissance par le Secrétaire-Trésorier de la municipalité du township de Chicoutimi, certifiant qu'il était dû £15 par la municipalité au défendeur :

“ Considérant, d'ailleurs, que l'acceptation d'un billet par les demandeurs de la part du défendeur, n'opérerait pas une novation de leur créance, et que leur action pouvait toujours être portée sur la dette originaire, la Cour renvoie l'exception du défendeur, et le condamne à payer aux demandeurs la somme de £29 14 8, avec intérêts et dépens.”

MACKAY, pour les demandeurs.

MIVILLE DE CHENE, pour le défendeur.

COUR DE CIRCUIT.—QUÉBEC.

Présent :—TASCHÉREAU, Juge.

No. 495. { JONES.....*Demandeur.*
 vs.
 { JONES.....*Défendeur.*

Jugé :—Que quoiqu'en exerçant la photographie l'on fasse acte de commerce, néanmoins, on ne peut pas considérer comme acte de commerce l'engagement d'un employé auquel le photographe paie un salaire, tout en lui enseignant l'art de la photographie ; et que, par conséquent, pour être admis à prouver tel marché ou contrat d'engagement par témoins, il faut un commencement de preuve par écrit.

Held :—That although the following of the art of photography is carrying on trade; nevertheless, the engagement of a party to whom the photographer pays a salary, at the same time that he instructs him in the art, cannot be considered as a commercial contract; and that, therefore, to be admitted to prove such engagement and contract by parol evidence, a commencement de preuve par écrit is necessary.

Jugement rendu le 25 avril, 1866.

TASCHÉREAU, Juge :—L'action est portée par le demandeur contre son frère, photographe, à Québec, pour recouvrement d'une somme qu'il réclame pour gages pendant le temps qu'il dit avoir passé à son service. Il n'y a pas de contrat par écrit; c'est un simple marché verbal qui pourrait se prouver par témoins, si la cause était de nature commerciale, ce que je ne pense pas. Il est évident que celui qui, exerçant l'art de la photographie, tient une boutique où il vend ses portraits doit être déclaré commerçant; mais il ne faut pas conclure de là que le fait d'engager un employé qui devra se rendre *généralement utile*, et qui, outre le but de gagner un salaire, a de plus en vue d'apprendre l'art que son maître exerce, soit un acte de nature commerciale.

Comme il n'y a pas le moindre commencement de preuve par écrit, pas même dans l'interrogatoire sur faits et articles soumis au défendeur, la Cour renvoie l'action avec dépens.

MAC KAY, pour le demandeur.

SECRETAN & DUNBAR, pour le défendeur.

COUR DE CIRCUIT.—QUÉBEC.

Présent :—STUART, Juge.

No. 1156. { WATTERSDemandeur.
vs.
{ REIFFENSTEIN, et al.....Défendeurs.

Jugé :—Que le seul fait de se présenter à la porte d'une banque, lorsque cette banque est fermée, après ses heures ordinaires de bureau, n'est pas une présentation suffisante pour paiement d'un billet promissoire telle que voulue lors du protêt.

Held :—That presentation of a promissory note at the closed door of a bank, after its usual office hours, is not such a presentation for payment of such promissory note as is necessary upon protest thereof.

Jugement rendu le 25 avril, 1866.

L'action était intentée par le demandeur, pour le recouvrement du montant d'un billet promissoire, contre le faiseur et l'endosseur. Le billet était payable à la banque de l'Amérique Britannique du Nord, le 3 juin, 1865, et ce jour étant un samedi, la banque fut fermée, suivant l'habitude, à deux heures.

Le notaire, allant présenter le billet pour paiement, trouva la banque fermée, et protesta le billet, constatant le refus de paiement, en disant qu'on lui avait refusé l'entrée de la banque.

Les défendeurs plaidèrent qu'il n'y avait pas eu de présentation pour paiement, dans l'après-midi du troisième jour de grâce, et que le protêt n'avait pas été fait dans le temps voulu par la loi.

STUART, Juge :—L'action doit être renvoyée avec dépens, car le notaire devait savoir que c'est un usage dans toutes les banques de ne s'occuper des protêts de billets et de lettres d'échange qu'après que l'heure des affaires ordinaires de la banque est passée. Cette coutume est introduite dans un but d'utilité publique, et afin de ne pas retarder la marche des affaires ordinaires des banques. C'est pourquoi le seul fait de trouver la porte fermée, ne

peut pas être considéré comme une présentation suffisante du billet pour paiement, et ne peut pas servir de base à un protêt.

ANDREWS & ANDREWS, pour le demandeur.

HEARN, pour les défendeurs.

COUR DE CIRCUIT.—QUÉBEC.

Présent :—TASCHEREAU, Juge.

No. 838.	{	NORDHEIMER, <i>et al.</i>	<i>Demandeurs.</i>
			vs.
		ROY	<i>Défendeur.</i>
			et
		LEMELIN	<i>Tiers-Saisi.</i>

Jugé :—Qu'un demandeur ne peut dans sa contestation de la déclaration d'un tiers-saisi, alléguer à la fois qu'il est propriétaire de certains effets possédés par le tiers-saisi, et conclure à ce que ces mêmes effets soient vendus en satisfaction d'un jugement obtenu contre le défendeur.

Held :—That a plaintiff in his contestation of the declaration of a garnishee, cannot allege himself to be the proprietor of certain effects in the possession of the said garnishee, and conclude that the same be sold to satisfy the amount of a judgment against the defendant.

Jugement rendu le 25 avril, 1866.

Les demandeurs, ayant obtenu contre le défendeur jugement pour £18.15.6, émanèrent une saisie-arrêt après jugement entre les mains de George Lemelin, gendre du défendeur, et chez qui celui-ci résidait.

Le tiers-saisi produisit une déclaration disant qu'il ne possédait rien des effets du défendeur.

Les demandeurs contestèrent cette déclaration comme frauduleuse, disant que le tiers-saisi avait en sa possession et tenait du défendeur un piano-forte, loué par les demandeurs au défendeur, et dont ils étaient encore les propriétaires.

La Cour, etc.—Considérant que les demandeurs allèguent dans leur contestation de la déclaration du tiers-saisi que le

piano-forte en question n'a pas cessé d'être leur propriété et que le défendeur ne le détient qu'à titre de louage..... la Cour maintient la réponse en droit du tiers-saisi à la contestation de sa déclaration par les demandeurs, et renvoie la contestation avec dépens contre les demandeurs.

LÉGARÉ, pour les demandeurs.

MIVILLE DE CHENE, pour le tiers-saisi.

COUR SUPÉRIEURE.—QUÉBEC.

Présent :—TASCHEREAU, Juge.

No. 117. { GLASS..... Demandeur.
vs.
{ DENISS, et al..... Défendeurs.

Jugé :—Que le dépôt exigé par la 65e règle de pratique ne doit se faire que simultanément avec la motion pour *venire facias*, et que cette dernière motion ne se peut faire qu'après la définition des faits à être soumis au jury.

Held :—That the deposit required by the 65th rule of practice need only be made at the same time with the motion for a *venire facias*, and that this motion can only be made after definition of the facts to be submitted to the Jury.

Jugement rendu le 14 avril, 1866.

Le défendeur avait, par son plaidoyer en réponse à la déclaration, fait choix d'un procès par jury. Un mois après cette option le demandeur fit motion, attendu que le défendeur avait négligé de déposer entre les mains du protonotaire, en même temps que la déclaration de son choix d'un procès par jury, la somme d'argent requise par la loi, et n'avait déposé aucune somme, que cette déclaration de choix d'un procès par jury fut annulée et déclarée sans effet.

Les parties ayant été entendues sur cette motion, le jugement suivant fut rendu :

La Cour, etc.—“ Considérant que le dépôt de la somme de £5 6 8 exigé par la règle 65e des règles de pratique de

cette Cour, ne doit se faire que simultanément avec la motion pour *venire facias*, et que cette dernière motion ne se peut faire qu'après la définition des faits à être soumis au jury :

“ Considérant que dans la présente cause, les faits dont le jury devra s'enquérir (si toutefois il y a lieu à un procès par jury) n'ont pas encore été déterminés ni définis conformément à la loi, et qu'en autant la motion du demandeur tendant à demander que le défendeur soit déclaré déchu de son droit à un procès par jury, est prématurément faite, la Cour renvoie la dite motion, quant à présent.

LANGLOIS, pour le demandeur.

ANDREWS & ANDREWS, pour les défendeurs.

COUR DE CIRCUIT.—QUÉBEC.

Présent :—STUART, Juge.

No. 477.	{	MURPHY.....	<i>Demandeur.</i>
		vs.	
		LA COMPAGNIE DES REMORQUEURS DU ST. LAURENT.....	<i>Défenderesse.</i>

Jugé :—Qu'un actionnaire d'une compagnie n'a pas le droit d'exiger qu'on lui laisse consulter les registres des lettres reçues et expédiées au sujet des affaires de cette compagnie, lorsque des ordres centraires ont été donnés par les directeurs.

Held :—That a shareholder in a company has no right to insist upon an inspection of the registers of the letters received and sent in relation to the affairs of such company, when orders to the contrary have been given by the directors.

Jugement rendu le 30 avril, 1866.

Le demandeur requérait l'émanation d'un bref de *mandamus* par une requête dans laquelle il alléguait qu'il était actionnaire de “ La compagnie des remorqueurs du St. Laurent,” pour un nombre considérable de parts; que cette compagnie était régie en ce qui regarde l'administration des affaires par un certain nombre de directeurs élus par les actionnaires; qu'il s'était pendant les heures de bureau présenté au lieu où la compagnie conduit ses

affaires, et là, avait demandé à consulter les registres des lettres reçues et expédiées par la compagnie, ses directeurs, agents ou officiers, touchant les affaires d'icelle; mais que le secrétaire avait refusé de satisfaire sa demande parce que les directeurs lui avaient donné l'ordre de ne laisser voir ces registres à personne autre qu'à eux mêmes.

Le demandeur alléguait de plus que les directeurs lui avaient également refusé l'accès à ces registres, et qu'en ce faisant ils avaient outrepassé leurs pouvoirs et empiété sur les droits des actionnaires qui se trouvaient ainsi dépourvus des moyens de connaître la conduite des affaires, l'état des finances, et tout ce qu'ils avaient intérêt à savoir. Il concluait à ce que la Cour reconnut ses droits en ordonnant aux directeurs de lui permettre de consulter les livres, ce que, disait-il, on lui avait refusé injustement.

La défenderesse répondit en droit. Selon elle le demandeur n'avait aucun droit d'inspecter les lettres et les communications reçues par les officiers de la compagnie au sujet des affaires qu'ils transigeaient. Son droit de veiller à la conduite des directeurs s'étendait seulement à visiter les livres de comptes et autres de la même nature. Un comité de direction conduisait les affaires de la société, ainsi que le permettait la charte d'incorporation, et ce comité avait certainement le droit d'empêcher les simples actionnaires d'inspecter ses lettres.

The Court, &c.—“ Considering that the propriety of communicating to individual shareholders the letters received by the defendants must be left to the discretion of the directors, and that the petitioner shews no particular interest in such letters, doth dismiss the petition for the issuing of a writ of *mandamus*.

HOLT & IRVINE, pour le demandeur.

ANDREWS & ANDREWS, pour la défenderesse.

BANC DE LA REINE, } DISTRICT DE QUEBEC.
EN APPEL.

Présents :—DUVAL, Juge-en-Chef, AYLWIN, MEREDITH,
DRUMMOND et MONDELET, Juges.

GUGY.....*Appelant.*
et
BROWN.....*Intimé.*

Jugé :—Que le montant d'une créance
une fois offerte en compensation dans une
cause où telle compensation a été plaidée,
ne peut pas l'être dans une autre cause,
lors même que la première cause serait
encore pendante devant la Cour.

Held :—That the amount of a debt al-
ready offered in compensation in a cause
where such compensation has already
been pleaded, cannot be so offered in an-
other cause, even though the first cause
be still pending before the Court.

Jugement rendu le 20 décembre, 1865.

L'action était portée par l'intimé contre Parent pour la
somme de \$230.80, montant d'un billet promissoire consenti
par l'appelant à Parent, et transporté par ce dernier à l'in-
timé. Gagy fut mis en cause comme garantie simple de
Parent.

Deux défenses séparées, mais absolument identiques,
furent produites par l'appelant, l'une comme débiteur
principal, l'autre comme gârant et prenant le fait et cause
de Parent. Il y disait que le demandeur lui devait, lors
de l'institution de l'action, une somme de £84.8.2, comme
montant d'un mémoire de frais dans une cause ci-devant
pendante entre eux, que partant il y avait eu compen-
sation.

L'intimé prétendit que cette défense ayant déjà été faite
à trois actions portées par l'intimé contre l'appelant, aux-
quelles il avait successivement opposé la même réclama-
tion, il ne pouvait pas l'opposer de nouveau et s'en préva-
loir pour faire renvoyer l'action de l'intimé.

La Cour Supérieure décida en faveur de l'intimé en
donnant pour un de ses motifs de jugement la raison
suivante :

"Considering that the plaintiff, Brown, by his special answer to the defendant's said plea of compensation, alleges and establishes in evidence that the said defendant, Gugsy, hath pleaded the self same costs in compensation to certain actions brought by the plaintiff against him, which actions are still pending and undetermined, and considering that the said defendant cannot legally plead the same debt in the present cause, after having made his option to set off the same against other sums of money due by him to the plaintiff, the Court doth condemn the said defendant, &c."

Ce jugement porté en révision fut confirmé unanimement par cette Cour; et la cause ensuite portée en appel, les deux jugements y furent confirmés.

MONDELET, Juge, *dissentiente* :—Il s'agit d'une question de compensation offerte en Cour de première instance par l'appelant, qui y était défendeur, à l'encontre d'une demande pour le recouvrement de la somme de \$203.83, avec intérêt du 18 février, 1862, montant d'un billet promissoire consenti par l'appelant au nommé Parent, et endossé par ce dernier en faveur de l'intimé.

L'appelant a produit deux défenses séparées, l'une comme débiteur principal, et l'autre comme garant simple. L'appelant prétendait que l'intimé lui devait lors de l'institution de l'action £84.3.2, montant d'un mémoire de frais dans une cause ci-devant pendante entre eux, devant la Cour Supérieure, et que l'intimé avait été condamné à lui payer; et qu'il y avait eu compensation, et que l'action de l'intimé aurait dû être déboutée.

L'intimé admet que cette prétention serait bien fondée, et qu'en effet, la compensation aurait eu lieu, si l'appelant s'était contenté de la faire valoir en cette instance; mais qu'ayant fait la même défense auparavant à l'encontre de trois actions intentées contre lui, pour le recouvrement de trois billets promissoires, il n'est pas recevable à faire valoir cette prétention en la présente instance.

La Cour de première instance a condamné l'appelant.

Sur appel à la Cour de Révision, cette Cour a, à l'unanimité, confirmé le jugement de la Cour de première instance.

Je pense qu'il n'y a guère de difficulté dans la cause actuelle. Evidemment la compensation ne peut avoir lieu qu'une seule fois, pour un montant quelconque ; et si elle avait déjà été prononcée dans l'une des trois causes où elle a été plaidée, il ne pouvait plus en être question dans aucune des autres. Mais il ne s'ensuit pas que cette compensation ne doit pas être prononcée dans la cause actuelle, tout au contraire, il s'ensuit que dans l'instance actuelle, elle aurait dû être prononcée, puisqu'on en était arrivé au mérite, sauf à la Cour à la rejeter dans les autres causes, si l'appelant, défendeur, après avoir éteint sa dette par cette compensation qu'eut prononcée la Cour, dans la présente instance, il eut demandé derechef à la faire admettre en extinction de ses autres dettes. Du moment que le jugement eut été rendu dans la présente instance, l'intimé aurait, va sans dire, insisté, et avec droit, à faire renvoyer les exceptions de compensation, plaidées dans les autres causes, voilà tout.

Je suis donc d'avis qu'attendu que ces exceptions de compensation sont autant d'espèces de moyens conservatoires que la partie peut opposer simultanément contre diverses demandes, l'appelant aurait dû avoir gain de cause, là où, arrivées au mérite, les parties devaient être jugées suivant leurs droits respectifs dans cette cause, sauf à statuer sur les autres actions lorsque la Cour serait appelée à le faire.

Ce qui précède est dans l'hypothèse où l'intimé aurait fait preuve que les dépens offerts en compensation dans trois autres causes, sont les mêmes que ceux qui font l'objet de l'exception de compensation dans l'instance actuelle, ce dont il ne paraît pas y avoir de preuve.

Il résulte de ce qui précède que l'action de l'intimé aurait dû être déboutée, au lieu du jugement qu'a rendu en sa faveur la Cour de première instance, et qu'a confirmé la Cour de Révision.

Je ne vois pas qu'il soit nécessaire de juger la question de savoir si les dépens portent intérêt, car il me paraît que la créance de l'appellant est d'un montant suffisant pour éteindre par la compensation celle de l'intimé.

A mon point de vue, donc, le jugement de la Cour de Révision, de même que celui de la Cour de première instance, doivent être infirmés, la compensation doit être prononcée, l'action de l'intimé déboutée.

La majorité de la Cour d'Appel confirma le jugement rendu par la Cour Inférieure, en autant qu'il n'y avait pas erreur, et pour les raisons mentionnées dans ce jugement.

FOURNIER & GLEASON, pour l'appellant.

Bossé & Bossé, pour l'intimé.

QUEEN'S BENCH, }
APPEAL SIDE.

DISTRICT OF QUEBEC.

Before:—MEREDITH, DRUMMOND, BADGLEY and TASCHEREAU, Justices.

PACAUD.....*Appellant.*

and

PELLETIER.....*Respondent*

Held:—That crown lots remain crown property so long as no patent issues in respect of the same, and that *hypothèques* granted upon such lots by individuals in possession of, and who have improved the same, do not attach, and convey no rights to the mortgagees.

Jugé:—Que les lots de la couronne continuent d'être propriétés de la couronne tant qu'il n'émane pas de patente pour tels lots, et que les hypothèques données sur telles propriétés par des individus qui en sont en possession, et qui les ont améliorées, ne sont pas valables et ne confèrent aucuns droits aux créanciers.

Judgment rendered the 17th December, 1864.

BADGLEY, Justice:—In 1860, the appellant sold to one

Augustin Lessard, one half of lot No. 2, in the 2nd range of Halifax, for £100, payable by eight instalments, and secured his price by a mortgage upon the lot sold, and upon the adjoining lot, half No. 2, in the 3rd range of Halifax, occupied by the said Lessard.

Lessard having failed to pay the appellant according to agreement, the appellant obtained judgment against him for the balance of 4 instalments, £35 2 6, with interest and costs. The plaintiff sued out execution *de bonis*, under which he sold the effects of the defendant, the levy being insufficient, and a balance remaining due, he issued execution *de terris*, and seized the above lots; the sale to be had in December, 1863. Lot No. 2, in the 2nd range, was sold; but the half of lot No. 2, in the 3rd range, was not sold, by reason of an opposition *afin de distraire*, filed by the respondent.

At the time of the seizure the lot was Crown property, and until patents issued therefor, remained such. The defendant had occupied it and hypothecated it. The defendant went into possession in January, 1860, by purchase from one Couture, whose betterments he acquired. The Government price was 2s. 9d. per acre. It is admitted that the lot was Government property, and that the defendant had not the property either by himself or by Couture.

On the 29th July, 1863, the respondent acquired the lot in question from the defendant with all his rights thereto, including the buildings and ameliorations, for the consideration stated in the deed of sale, which was paid, \$66.50 due for Government arrears; upon payment of this sum to the Government, the respondent obtained a location ticket for the lot, and finally, on payment of the Government dues, on the 24th August, 1863, obtained his patent for the lot on the 31st August, 1864, whereby he acquired the property. The lot in question never had been the

property of the defendant, nor until the patent issued, had it ceased to be government property. The respondent filed his opposition, and claimed the lot as his.

It is elementary to say that *l'hypothèque est le droit qu'a un créancier dans la chose d'autrui*. The defendant, not having the property of the lot, the hypothec, given under deed of 19th June, 1860, cannot avail to the appellant.

It is also elementary to say that until Crown property is patented it remains Crown property, and that the seizure of an unpatented Crown lot cannot avail to the appellant, because it went from the Crown to the respondent.

The respondent was well founded in demanding *distraction* of the lot from the seizure, and the judgment appealed from must be sustained, but as the respondent knew of the transactions between the plaintiff and defendant, both parties must pay their own costs in both courts.

The Court, &c.—Considering that in the judgment rendered in the Superior Court, sitting at Arthabaskaville, on the nineteenth day of March, one thousand eight hundred and sixty-four, there is no error in the *motifs* and merits of the said judgment, but considering that both parties were blamable in the proceedings taken between themselves in respect of the said lot of land in contest between them in this cause, doth confirm the said judgment, but without costs to either party, in either Court.

PACAUD, for appellant.

BARWIS, for respondent.

PARKIN, Q. C. Counsel.

QUEEN'S BENCH, } DISTRICT OF MONTREAL.
 APPEAL SIDE. }

Before :—DUVAL, Chief-Justice, AYLWIN, MEREDITH,
 DRUMMOND and MONDELET, Justices.

GRANT..... *Appellant.*

and

LOCKHEAD..... *Respondent.*

Held:—That a writ of *certiorari* must be addressed to the Judges and not to the prothonotary of the Court, and that a writ issued contrary to this rule will be quashed.

Jugé :—Qu'un bref de *certiorari* doit être adressé aux Juges et non au prothonotaire de la Cour, et qu'un bref émané contrairement à cette règle doit être rejeté.

Judgment rendered the 8th March, 1866.

On the 1st December, 1865, the appellant moved the Court for a writ of *certiorari* "to be addressed to the prothonotary of the Superior Court, for Lower Canada, district of Montreal, and that he be thereby ordered and enjoined to take back the transcript or record of the proceedings in the said cause, made and had in the said Superior Court, and made, produced and filed by the said prothonotary in this cause, in the said Court of appeals, and that the said prothonotary be ordered and enjoined to amend the same; and the proceedings therein contained, mentioned and set forth, and the said transcript or record of proceedings so amended, to produce and file in this Honorable Court, for the following among other reasons: 1° Because the said transcript or record of proceedings before this Honorable Court, in the said cause filed are irregular, erroneous and informal, and do not contain a true and faithful copy or representation of the proceedings, and all the proceedings made and had in the said cause, in the said Superior Court of Lower Canada, district of Montreal. 2° Because the said transcript of proceedings now before this Honorable Court, in the said cause filed, does not contain a copy or make mention of a certain final judg-

ment, in the said cause made and rendered in the said Superior Court for Lower Canada, district of Montreal, on the 31st day of March, now last past. 3° Because the said transcript or record of proceedings now before this Honorable Court, in the said cause filed, does not contain a copy of, or make mention of a certain final judgment in the said cause made and rendered in the said Superior Court for Lower Canada, district of Montreal, on the twenty-fifth day of April last. 4° Because the said transcript or record of proceedings now before this Honorable Court, in the said cause, erroneously sets forth and states, in the judgment of the thirty-first day of May, in the said cause made and rendered on that day, and mentioned and contained in the said transcript or record of proceedings, that : " The Court having heard the parties by their Counsel, &c." when the same is entirely false and untrue, inasmuch as on the said nineteenth day of May last past, on which the said cause was inscribed by the attorneys of the said Daniel Lockhead, for hearing *de novo* on the merits, the said William Forsyth Grant moved for the rejection of the said inscription, for reasons contained and set forth in a certain motion, in the said cause made and filed on that day, and did formally decline to take part in the argument of the said cause, as fully appears by the entries of the said prothonotary of the said Superior Court, of the said nineteenth day of May, now last past."

The writ of *certiorari* was returned on the 9th December, 1865, by Messrs. Coffin, Papineau and Honey, with a special return in the following terms :

" The prothonotary of the said Court, in obedience to the writ of *certiorari* hereunto annexed, bearing date the first day of December instant, and served upon them on the seventh day of the same month, in the afternoon, have the honor respectfully to state, that upon the thirty first day of March, last past, several judgments were rendered in the said Court, and several records sent down to the

office of the said prothonotary as being records in the causes wherein judgments had been so rendered, accompanied by notes of the Judges, specifying the nature of the judgment, and to be extended into due form by the prothonotary. That on such occasions it is usual in their office that there should be immediately written out a list of judgments just rendered: and that in the list so made upon the thirty first of March last, is to be found an entry that judgment dismissing the action in this cause had been rendered on that day. That after the rendering of the said judgment, and before its extension in due form by them, the said prothonotary, the Honorable Mr. Justice Badgley, who had verbally rendered the said judgment, ordered them the said prothonotary to send to him the said record, declaring that the judgment could not be entered up, inasmuch as he had omitted to examine sufficiently a certain lease filed in the said record. That on the sixth day of April, then following, and now last past, the plaintiff inscribed the said cause on the *role* for Review by the Judges of the said Court, making at the same time the necessary deposit of forty dollars. That afterwards, to wit: on the first day of May, last past, Robert MacKay, Esquire, attorney of the said plaintiff, in the said cause, wrote upon the back of the said inscription for Review that he withdrew it, as having been prematurely made, as appears by the said proceeding marked number thirty-seven amongst the proceedings in this cause, and after such indorsement, to wit: on the last mentioned day and year, the said plaintiff came and withdrew the said money which had been so deposited. That on the twenty-fifth day of the said month of April, the said Honorable Mr. Justice Badgley, verbally rendered judgment in the said cause, handing down the record with a note of the judgment, to be extended by them, the said prothonotary. That the said last mentioned judgment was conformably to the usage in that particular, entered in a list of judgments rendered on that day, and by George Pyke, Esquire, one of the deputies of them, the

said prothonotary, extended into a draft of judgment, a copy of which marked D. R., they, the said prothonotary, have the honor to return herewith and hereunto annexed. That the said Honorable Mr. Justice Badgley, having after the said twenty-fifth day of April, sent for the record, did on the twenty-ninth day of the said month of April, return the same to them, the said prothonotary, accompanied with an order in writing discharging the *délibéré* of the said cause, and ordering a rehearing before him, on the 19th day of May, then following, and now last past, a copy of which order is herewith returned marked E. F. That, on the said nineteenth day of May, the said cause being, conformably to the said last mentioned order, on the *rôle de droit* for hearing on the merits, and having been called for such hearing, the said defendant's attorney made and filed in the said cause a motion that the said last mentioned inscription should, for the reasons set forth in the said motion, be discharged; which motion was rejected by the said Honorable Judge Badgley, who then was holding the said Court. That it appears by entries in the said Honorable Judge's diary, and in theirs, the said prothonotary, respectively, (authentic copies whereof marked respectively L. M. and N. O., they, the said prothonotary, have the honor to transmit hereunto annexed,) that the defendant being called at such hearing, did not appear, and that the plaintiff was heard and the said cause then taken *en délibéré*. That on the thirty-first day of May, then next, and now last past, the said Honorable Mr. Justice Badgley, rendered a judgment in the said cause, the substance of which is contained in the extended draft aforesaid, but on the back of which draft, the date of the twenty-fifth April, 1865, has been obliterated, and the said 31st of May last past has been substituted in the handwriting of the said George Pyke, Esquire, which endorsement is paraphed in the initials of the name and in the handwriting of the said Honorable Judge. And they, the said prothonotary, respectfully return that the foregoing is all that they know, and can return in obedience to and in compliance with the exigence of the said writ.

E. F.

No. 2382. Lockhead vs. Grant.

The *délibéré* in this cause is discharged for a rehearing before me on the 19th day of May next, on the point of the cancelment of the lease after one year's occupation, with reference to the claim for manure put upon the land by the plaintiff under his lease.

L. M.

Copy of the entry made by the Honorable Mr. Justice Badgley, in his diary, on the 19th day of May, 1865, in the undermentioned cause :

No. 2382. Lockhead vs. Grant.

Merits de novo.

The following entry made by Mr. Justice Badgley :

"Dcl." "Def. does not appear."

N. O.

Copy of the entry made in the prothonotary's diary, on the 19th day of May, 1865, in the undermentioned cause :

No. 2382. Lockhead vs. Grant.

Merits de novo.

Defendant presents motion to discharge inscription for rehearing. This motion rejected. The defendant being called, did not appear. Plaintiff heard.

C. A. V.

On the 1st March, 1866, it was moved on behalf of Grant that the prothonotary of the said Superior Court for Lower Canada, district of Montreal, be ordered and enjoined to take back the writ of *certiorari* in the said cause issued, and directed to the said prothonotary, and also the return of the said prothonotary to the said writ made and returned into this Honorable Court on the 9th day of December last past, and that the said prothonotary be ordered to amend the same, and to return therewith a copy of the judgment so by them returned as having been

verbally pronounced by the Honorable Mr. Justice Badgley, on the 31st day of March, 1865, together with a copy of the notes of the said Honorable Mr. Justice Badgley, which were sent down therewith on that day, and return the same so amended to this Honorable Court with all due diligence for the following amongst other reasons: 1° Because the said prothonotary hath not obeyed the exigencies of the said writ of *certiorari*, as in and by the said writ the said prothonotary was expressly commanded. Commanding the said prothonotary to certify and return to the said Court of Queen's Bench for Lower Canada, first, a copy of a certain final judgment in the said cause made and rendered in the said Superior Court for Lower Canada, district of Montreal, on the 31st day of March now last past: 2° Because the said prothonotary in the return to the said writ of *certiorari* and expressly to the foregoing exigencies or requirements in the said writ contained, and hereinbefore mentioned, hath reported and returned as follows: "That after the rendering of the said judgment, to wit: the said judgment of the thirty-first day of March now last past, and before its extension in due form by them the said prothonotary, the Honorable Mr. Justice Badgley ordered them, the said prothonotary, to send to him the said record, to wit: the record in the said cause in the Court below, declaring that the said judgment could not be entered up inasmuch as he had omitted to examine sufficiently a certain lease filed in the said record," and because the said answer of the said prothonotary is not and does not contain any answer whatever to the requirements of the said writ of *certiorari* in that behalf, and because the said return is in all particulars and respects insufficient and evasive, the notes of the said Judge are not given, upon which the said judgment was founded or to be founded, or was extended, are not given and are omitted, and which said answer is also in other respects informal: 3° Because the said prothonotary hath not otherwise obeyed the exigencies of the said writ, in and by the said return thereto, commanding the said

prothonotary to give a transcript of the entry in the diary having reference to this cause of the proceedings therein had, as the said prothonotary was and were enjoined and bound to make and give, in the said return to the said writ of *certiorari* in the said cause issued: 4° Because the said return to the said writ of *certiorari* is in all other respects informal, irregular, incorrect, and insufficient, and is no return whatever to the requirements of the said writ of *certiorari*. "

Upon this the Court of Queen's Bench gave the following order:

It is ordered, inasmuch as the motion of the appellant for a writ of *certiorari* was submitted to this Court, without any explanation of the object sought to be obtained by the said writ of *certiorari*, and without any verbal intimation of the intention of the appellant to cause the said writ to be addressed to the prothonotary of the Superior Court, and also without any objection having been made by the respondent, by means whereof this Court was led to regard the said motion as a motion of course, and in consequence, without the case having been taken *en délibéré*, ordered a writ of *certiorari* to issue as prayed for: and whereas the said order which was so obtained is irregular and contrary to the course and practice of this Court, inasmuch as it directs the said writ of *certiorari* to be addressed to the prothonotary of the Superior Court, instead of being addressed, as it ought to be, to the Chief-Justice and Justices of the said Superior Court, doth in consequence reverse and set aside the said order, and doth quash and annul the writ of *certiorari* issued in this cause under the said order, and doth further order that the return made by the prothonotary to the said writ of *certiorari* be taken off of the files of this Court.

KERR, for appellant.

MACKEY & AUSTIN, for respondent.

COUR DE CIRCUIT.—QUEBEC.

Présent :—TASCHEREAU, Juge.

No. 791. { LA CORPORATION DE ST. JEAN
BAPTISTE, ISLE D'ORLEANS..Demanderesse.
vs.
LACHANCE.....Défendeur.

Jugé :—Que dans une action pour empiètement sur un chemin public, le défendeur peut opposer pour défense que l'empiètement est commis par des tierces personnes.

Held :—That in an action for encroachment on a public road, the defendant can set up by way of defence that the encroachment was made by third parties.

Jugement rendu le 25 avril, 1866.

L'action en la cause était portée contre le défendeur pour empiètement sur un chemin appelé *chemin à Gué*, appartenant à la demanderesse, et aussi sur le chemin Royal.

A cette action le défendeur plaida par une exception péremptoire en droit perpétuelle, que l'empiètement en question était commis sur le chemin à Gué par des personnes possédant des terres de l'autre côté de ce chemin, vis-à-vis l'immeuble du défendeur, et que loin d'empiéter sur le chemin Royal, c'était la demanderesse qui, sans être légalement autorisée, avait changé la direction de ce chemin et l'avait fait passer sur le terrain du défendeur.

La demanderesse, par une défense au fonds en droit, disait : 1° Que l'action étant une action réelle intentée contre le défendeur pour empiètement par lui commis, le défendeur ne pouvait y répondre en accusant une tierce personne de l'empiètement qu'on lui imputait : 2° Qu'il ne s'ensuivait pas que le défendeur fut justifiable de commettre le dit empiètement à cause de quelques changements faits par

la demanderesse dans le chemin Royal, dans un autre endroit que celui où le défendeur avait empiété.

La Cour considérant que la réponse en droit de la demanderesse à l'exception du défendeur était non fondée, et que le défendeur pouvait légalement plaider les matières et choses énoncées dans sa dite exception, renvoie la réponse en droit de la demanderesse avec dépens.

CARON, pour la demanderesse.

BOSSÉ & BOSSÉ, pour le défendeur.

COUR SUPERIEURE.—QUEBEC.

Présent :—STUART, Juge.

No. 1820.	{	PITON.....	<i>Requérant.</i>
		et	
	{	LEMOINE.....	<i>Défendeur.</i>

Jugé :—1o. Qu'un bref de *certiorari* adressé au surintendant de police, lorsqu'il aurait dû l'être au Juge des sessions de la paix, suivant les dispositions de la 25 Vict., ch. 13, sect. 1, sera annulé.

2o. Qu'un nouveau bref ne sera pas accordé sur motion à cet effet pour rectifier l'erreur commise dans l'adresse du premier bref.

Held :—1o. That a writ of *certiorari* addressed to the Superintendent of Police, and which ought to have been addressed to the Judge of the Sessions of the Peace, according to the provisions of the 25 Vict., cap. 13, sect. 1, will be set aside.

2o. That another writ will not be awarded upon motion to that effect, to rectify the error in the address of the first writ.

Jugement rendu le 5 mai, 1866.

Le requérant, Piton, avait été condamné pour vente de liqueurs sans licence; sur motion, il obtint un bref de *certiorari* adressé à John Maguire, écuyer, surintendant de police dans et pour le district de Québec. Ce bref fut rapporté avec un retour qui constatait que le dit John Maguire n'avait jamais occupé la charge de surintendant de police, mais que son titre était Juge des sessions de la paix; que jamais comme surintendant de police il n'avait

rendu de jugement ou donné d'ordre dans la cause mentionnée dans le bref, mais qu'il avait ainsi agi en sa qualité de Juge des sessions.

Sur motion du procureur de Lemoine, inspecteur du revenu et poursuivant comme tel, le retour de ce bref fut annulé parcequ'il n'avait pas été adressé au Juge qui avait prononcé la condamnation de Piton, et parce qu'il n'y avait ainsi devant la Cour aucune pièce de procédure dont elle pouvait s'occuper.

Subséquentement, le défendeur et requérant, Piton, fit motion pour qu'il émana un bref de *certiorari* adressé à John Maguire, Juge des sessions de la paix, dans et pour le district de Québec, afin de mettre à exécution le jugement précédemment rendu par la Cour ordonnant l'émanation d'un bref de *certiorari*, attendu que par erreur ce bref avait été mal adressé, et de plus attendu que le dit jugement n'avait jamais été mis de côté, ni rescindé, et ainsi qu'il avait encore pleine valeur et effet; et enfin parce que le mérite de la cause n'avait pas encore été jugé.

Plusieurs autorités furent citées de la part du requérant qui prouvaient que de semblables procédures étaient autorisées par les Cours d'Angleterre, entre autres :

Bacon's Abridgment, p. 574, vbo. *Certiorari* : " If a *certiorari* issues, and the record is not thereby removed, the Court above cannot proceed upon it, but will quash the writ and award a new one." (1)

Jugement :—Take nothing by motion.

TALBOT & TOUSIGNANT, pour le requérant.

ANDREWS & ANDREWS, pour le défendeur.

(1) Autorités citées par le requérant :
 1 Hawk, P. C., cap. 27, sec. 87 :—Dickinson's Guide, p. 969, à la note :—1 Tomlin's Law Dict., vbo. *Certiorari* :—1 Coventry and Hughes Digest, vbo. *Certiorari*, p. 266, sec. 25, p. 269, sec. 6, sous-sec. 1 :—Burn's Justice, Edit. de 1793, p. 351, vbo. *Certiorari* :—Gray's practice, p. 293 :—Stat. Ref. B. C., ch. 89., p. 846. Version française.

QUEEN'S BENCH, } DISTRICT OF QUEBEC.
 APPEAL SIDE.

Before:—DUVAL, Chief Justice, AYLWIN, MEREDITH,
 DRUMMOND, and MONDELET, Justices.

LAIDLAW.....*Appellant.*

and

BURNS.....*Respondent.*

Held:—10. That a creditor for a sum of money under ten pounds, cannot, for the purpose of arresting his debtor, add to the amount of his claim an amount assigned to him, and thereupon issue a *capias ad respondendum*, without a previous notification to the debtor of such assignment, inasmuch as notification of the assignment is necessary to vest the debt in the assignee.

20. That in an action for malicious arrest, the plaintiff must allege and establish in evidence, that he was arrested maliciously, and without reasonable or probable cause.

Jugé:—10. Qu'un créancier pour une somme d'argent au-dessous de dix louis, ne peut, dans le but d'arrêter son débiteur, ajouter au montant de sa réclamation un montant à lui transporté, et sur ce émaner un *cahier ad respondendum*, sans signification préalable au débiteur de tel transport, en autant que signification du transport est nécessaire avant que le cessionnaire devienne créancier du débiteur.

20. Que dans une action pour faux emprisonnement, le demandeur est tenu d'alléguer et d'établir en preuve, qu'il a été malicieusement arrêté, sans raison ou cause probable.

Judgment rendered the 19th March, 1866.

The action was brought in the Superior Court, at Quebec, on the 7th April, 1864, by the respondent, to recover damages for an alleged malicious arrest. The circumstances of the case were these: The respondent had resided in Quebec for about a year previous to the 11th February, 1864, when he was arrested by the appellant; it appeared that he was earning a considerable income. The respondent was indebted to the appellant in a sum of £9 11 7.

Laidlaw stated that he had been informed, two or three days before the arrest, by Mrs. and Miss Bansley, that the respondent was going to leave town, and probably leave the province, and that he received other information from the same persons, on the same subject, on the night before the arrest; that thereupon, he went to the respondent's house and demanded immediate payment. Burns ad-

mitted the debt, and also that he was going to Montreal on the following morning, Laidlaw, knowing that the amount due to him was insufficient to justify the arrest of his debtor, procured the assignment of a small amount (14s. 6d.) due by Burns, to a person named Waters, who never had sent his account or demanded payment. The respondent was then arrested on a *capias* and conveyed to gaol, where he remained for several hours, when he paid the debt and costs and was released.

The respondent considering himself aggrieved by these proceedings instituted an action which resulted in a judgment in his favour, condemning the appellant to \$50 damages and costs.

ANDREWS, for appellant:—The appellant contends that it was immaterial to the issue between the parties whether the respondent had or had not been about to secrete his estate, or to abscond with intent to defraud his creditors, the question raised by the pleadings being whether the appellant had sufficient reason to believe such was the case, when he made his affidavit. This Court has already held that no responsibility attaches to the exercise of an absolute right, whatever the motive by which the party was prompted in the exercise of it. (1) If a creditor of a sum of \$40 has reasonable grounds for believing that his debtor is about to secrete his estate, or to leave the province with a fraudulent intention, and that by so doing the creditor will lose his remedy, he, in apprehending his debtor by his body, does but exercise a right which the law sanctions, and is consequently not amenable to any action of damages for so doing, although it should be afterwards proved that the debtor had really not contemplated any fraudulent act, because the plaintiff was not, and had not been, to blame in obtaining the process against him. Both French and English law maintain that no action

(1) David and Thomas, 1 L. C. Jurist, p. 69:—Hilliard on Torts, p. 224, No. 22.

can be sustained against a person attaching the body of his debtor by civil process, unless the plaintiff in such an action proves the absence of probable cause; and in either country where the right of arrest exists it is of no consequence that it is maliciously exercised, but as soon as there is a probable cause, the plaintiff has a right to issue a *capias*. There is no doubt that, in this cause, Laidlaw acted *bona fide*. The appellant further contends that Burns was indebted to him in the sum of forty dollars, because the signification of the transfer made by Waters was not necessary. (1) The respondent by his words and actions was himself the sole cause and occasion of his arrest, he only must be blamed and must suffer.

IRVINE, for respondent:—There was no debt legally due to the appellant of sufficient amount to justify the arrest. The law requires that the plaintiff should establish that the defendant is *personally* indebted to him in a sum of forty dollars, or more. In this case there was not such a sum due to the plaintiff, because the sum due to Waters, and by him assigned to the appellant, was not personally due to the appellant at the time the writ issued. It is a principle of law, that a debt assigned is not vested in the assignee until notice of the assignment is given to the debtor. The respondent contends that this principle must be applied in this case, although a series of decisions has established that the service of an action founded on an assignment is a sufficient notice of such assignment, inasmuch as the declaration recites the transaction, but surely it cannot be pretended that an action commenced by a *capias* gives to the debtor the required signification of the transfer. No declaration is served; the defendant merely receives a copy of the writ stating the amount by him due, and he is then shut up in gaol, where he cannot receive information as to the cause of the plaintiff having become his creditor.

(1) 26 Eng. L. and Eq. Rep. p. 410:—Hilliard on Torts, p. 513, par. 24, and p. 503, par. 22, and p. 247:—Quinn vs. Atcheson, 4 L. C. Rep., p. 378:—1, L. C. Jurist, p. 101.

The grounds set forth in the affidavit were insufficient to justify the issue of the *capias*, because he allows himself to be influenced by the unfounded tales of two women, who were acting from motives of malice, and the appellant did not take any precautions to verify their statements.

MONDELET, Justice :—I am of opinion that the judgment appealed from awarding damages against the appellant for false arrest and imprisonment, must be confirmed, but not altogether for the motives it sets out, inasmuch as it is not correct to say that the plaintiff has established the material allegations of his declaration. I would strike out that part of the *considérant* and adopt the rest. I wish to be clearly understood : it is not because the appellant was not about secreting his effects and leaving the province, that the appellant must be condemned, but solely because he has not proved that he had reason to believe, from the information he obtained, or was given him, that the respondent was about to secrete his effects and leave the province.

I would therefore place the judgment upon that footing, and then confirm it.

MEREDITH, Justice :—After going over the evidence in this case with much care, and more than once, it seems to me that the plaintiff was not immediately about to leave the province when he was arrested by the appellant ; but, notwithstanding this, I am of opinion that the appellant had reasonable and probable cause for arresting the respondent ; and that such being the case, the latter is not entitled to damages, merely because it seems that the respondent was not about to abscond when arrested.

The learned counsel for the appellant, in the course of his argument, referred to a judgment rendered by me in the year 1854, in the case of McTeer vs. Scrim.

In that case I observed (as I find by a note which I

made at the time) that "although the information upon which an arrest is made may be such as to have given the creditor reason to believe that his debtor was immediately about to abscond; yet, if it prove to be erroneous, the debtor will be entitled to be discharged from custody; but the creditor, if sued for a malicious arrest, will be allowed to take advantage of the information upon which he acted." This view still seems to me correct.

Upon the one hand, it would be plainly wrong to keep a man in jail after he had proved that the information upon which he had been arrested was erroneous; and, on the other hand, a creditor ought not to be mulcted in damages when, for the recovery of a just debt, he has done nothing but what a prudent and right minded man would have done under the circumstances.

According to the English authorities, in an action for malicious arrest, it is necessary for the plaintiff to allege and prove *malice* and want of probable cause; (1) and the jury are at liberty, but are not bound, to presume malice from want of probable cause. (2) In this district, as early as the year 1813, it was held in the case of Ritchie and Flower, "that in an action for malicious arrest the plaintiff must allege and show in evidence that he was arrested without reasonable or probable cause." (3) And the Court of Queen's Bench, at Montreal, in 1849, held the same doctrine in the case of Dease vs. Townsend. (4)

I do not fail to bear in mind that although in suits for malicious prosecutions (connected as they are with the administration of criminal justice) the Court is to be guided by English law; yet, that in actions for malicious arrests,

(1) 1 Hilliard on Torts, page 231, Ed. of 1859 :—2 Crompton and Meeson's Rep. 720 :—3 Ad. and El., 661 :—2 Car. and P., 464.

(2) 1 Hilliard, page 236.

(3) Ritchie and Flower, 1st Rev. de Lég., page 381.

(4) July 24, 1849, Dease vs. Townsend (from my note book) : "Held, that in actions for malicious arrest, as in actions for malicious prosecutions, malice and want of probable cause must be alleged and proved."

(which have their origin in civil suits) the Court must follow our own law ; but as regards the point under consideration I do not think there is any very important difference between the two systems. The rules of the French law on this subject are very well explained by Carré and Chauveau, in the following passage : “ On ne peut constater qu’il n’y ait, dans le soutien du procès, indépendamment des avances des frais et des dépenses qu’on ne peut répéter, une succession continuelle de démarches, de désagréments, d’anxiétés, d’inquiétudes, qui les rendent très préjudiciables aux parties mêmes qui finissent par triompher. ”

“ De là on pourrait conclure qu’une mauvaise contestation rend toujours, en droit, passible de dommages-intérêts la partie qui l’a introduite ou soutenue.

“ Mais il faut sainement entendre le principe de l’article 1382 : ‘ Tout fait quelconque de l’homme qui cause à autrui un dommage, oblige celui par la *faute* duquel il est arrivé à le réparer. ’ ”

“ On le voit, il ne suffit pas que le dommage soit occasionné par un fait de l’homme, pour que son auteur soit obligé à le réparer ; il faut encore que ce fait soit une *faute*, c’est-à-dire qu’il faut que ce fait soit le résultat d’un mauvais vouloir, d’une négligence ou de l’impéritie.....”

“ Ainsi nous devons faire la précision suivante : le fait qui cause un préjudice à autrui n’oblige à réparation qu’autant qu’il ne consiste pas dans l’exercice d’un droit.”

“ Or, toutes les fois qu’un plaideur est de bonne foi dans sa prétention, c’est un droit pour lui de la soutenir. Si la loi est contre lui, qu’il succombe ; que, pour avoir mal présumé de ses dispositions, il soit condamné aux dépens ; mais qu’aucun dommage ne lui soit imposé, car c’était un droit pour lui de réclamer ou de défendre ce qu’il croyait lui appartenir.”

“ Mais il se peut que, bien convaincu du peu de fondement de sa cause, il ne l'intente et ne la poursuive que dans le but, vexatoire et coupable, de tourmenter, d'inquiéter son adversaire; un sentiment de haine, de jalousie, de mesquine tracasserie, peut être le mobile de son action.”

“ Dans ce cas, il devra des dommages; car céder à ce mauvais sentiment, c'est une faute; cette faute cause un préjudice; elle soumet à une réparation. C'est là, ce nous semble, le système consacré par le petit nombre d'arrêts que nous avons pu recueillir sur cette question.” (1)

It may however be contended that if a debtor be liberated from custody on the ground that the information upon which the plaintiff acted was erroneous, that the defendant, although not entitled to vindictive damages, ought to be allowed compensation for any actual loss caused to him by the arrest; and this on the ground that the arrest, in the case supposed, would be attributable to a mistake on the part of the plaintiff. But it may be answered that even in the case just mentioned, the plaintiff would not be the only person to blame.

It is the defendant who, by neglecting to pay a just debt, renders it necessary for the plaintiff to proceed. And if the plaintiff, in the course of his proceedings, do nothing but what a reasonable and prudent man would do under the circumstances, and if, notwithstanding this, a mistake occur, injurious to the defendant, he cannot, according to the authorities, claim damages for an unavoidable mistake occurring in proceedings rendered necessary by himself.

The next point to be considered is the objection on the part of the respondent, that a part of the debt for which he was arrested was claimed by the appellant under a transfer of

(1) 1 Carré et Chauveau, page 641, on Art. 128, ques. 544.

which no notice, *signification*, had been given to the respondent.

In the factum of the respondent it is admitted (and I believe it to be beyond doubt, true,) "that a long series of decisions (1) extending over a number of years has established that the service of an action founded on a transfer is a sufficient notice to enable the new creditor to recover."

It is, however, contended by the respondent, that a distinction ought to be made between actions commenced by an ordinary writ of summons, and actions commenced by a writ of *capias ad respondendum*. The appellant relies on the case of *Quinn vs. Atcheson*, decided by the present Chief-Justice of this Court, Mr. Justice Caron and myself, and which it must be admitted, is exactly analogous to the present case. When I concurred in that judgment, I did so, (as I find by my note book,) on the ground "that as we hold that an action may be maintained on a transfer not signified, I cannot say that a *capias ad respondendum*, (which, under certain circumstances, is an incident of the right to sue,) may not issue."

Upon further considering this point, it seems to me that there is an objection to the arresting of a debtor upon a transfer not signified, which does not apply to the maintaining of an ordinary action upon a transfer also not signified. Our Courts have held, not that a transfer without

(1) As to the Jurisprudence in the district of Montreal, see observations of Sir L. H. Lafontaine, in Lamothe and Fontaine, 7 L. C. Reports, page 51. "Il est bien vrai que la jurisprudence générale est, que l'action lorsqu'elle est dirigée contre le débiteur personnel est censée une signification suffisante du transport. Il ne doit pas s'élever de difficulté que quant aux frais."

As to the Jurisprudence in Quebec, see remarks of Ch.-J. Bowen. *Martin vs. Côté*, 1 L. C. Reports, page 240. Also remarks of Chief-Justice Duval in *Quinn vs. Atcheson*, 4 L. C. Report, 378 (the other judges being Caron and Meredith, also judgment of Mr. Justice Badgley and Mr. Justice Stuart, reversing a judgment of the Superior Court at Quebec, in *Mignot and Read*, the reason of their judgment being: "That by the jurisprudence established in Lower Canada, the service of the action upon the personal debtor at the suit of the personal creditor is a good and sufficient signification upon the debtor of the assignment to the creditor of the personal debt of the said debtor." (*))

(*) We believe that the decisions have invariably been as above stated, and we have been unable to find any case, excepting the case of *Mignot and Read*, afterwards reversed, in which a contrary rule has obtained.—*Ed. L. C. Rep.*

signification is sufficient to vest the debt in the assignee, but, that the service of the action on the part of the assignee is a sufficient notice of the assignment; (1) thus admitting that a notice of the assignment is necessary to vest the debt, as regards the debtor, in the assignee. Now a plaintiff suing out a writ of *capias ad respondendum* is obliged to swear that the defendant, at the time of the making of the affidavit, is indebted to him in the amount for which the writ is to issue.

But how can this be done, consistently with truth, when, taking the most favourable view of the case for the plaintiff, it is admitted that the service of the action, to be thereafter made, is necessary to vest the debt in the plaintiff. (2)

It has been said, although not in this case, that the *capias ad respondendum* is a conservatory process, and therefore ought to be viewed with more favour than an ordinary action. But the answer is, that whatever may be the nature of the process to be issued, it cannot justify the taking of an affidavit that is untrue.

This difficulty did not present itself to my mind when I concurred in *Quinn vs. Atcheson*, nor was it, I believe, submitted in this case; and therefore, if the judgment about to be rendered depended upon my opinion, I would probably wish to hear the parties upon the point under notice; but this is unnecessary as I do not concur in the judgment about to be rendered. Even if I were satisfied that the *capias* in this cause issued irregularly, as I must admit I now think it did, still I would say that the damages ought to be merely nominal.

The plaintiff acted in good faith, upon the advice of experienced counsel, who were guided in their proceedings by a judgment rendered by three of the judges of this Court, in pursuance, as was supposed, of a well established jurisprudence. The defendant, on the other hand, not

(1) 4, L. C. R., p. 378.

(2) Pothier, *Vente*, No. 558.

only neglected to pay a just debt, but acted in such a way as to cause it to be supposed he was about to abscond; and when the plaintiff called upon the defendant for an explanation he was rudely shown to the door.

In an ordinary case, I certainly would not disturb a judgment awarding £12.10.0 to a plaintiff who had been subjected to any wrongful imprisonment; but under the very peculiar circumstances of the present case, and more particularly bearing in mind the judgment by which the defendant was guided, I do not think that he ought to be held to pay, or that the plaintiff is entitled to receive, any thing beyond merely nominal damages.

There is, however, one part of the case with respect to which I think the proceedings of the appellant are objectionable. The appellant having sued the respondent, without notice of the assignment, had no right to arrest the defendant for the costs of the action. (1) He nevertheless did so, and compelled the respondent to pay, as costs, over £5.0.0, and this sum I think the appellant ought to be held to refund.

The judgment in appeal is as follows:—

The Court, &c.—“ Considering that it is established in evidence, that, at the time of the arrest of the said respondent, he was not indebted to the said appellant in a sum amounting to or exceeding forty dollars; and that he was not about, either to abscond, or to secrete his estate, debts and effects, with intent to defraud his creditors; and that therefore, there is no error in the judgment appealed from, doth confirm the said judgment, &c.”

Dissentientibus, the Chief-Justice and MEREDITH, Justice.

ANDREWS & ANDREWS, for appellant.

HOLT & IRVINE, for respondent.

(1) *Paré vs. Derouselle*, 6 L. C. Rep., page 411.

QUEEN'S BENCH, } DISTRICT OF QUEBEC.
 APPEAL SIDE.

Before :—DUVAL, Chief-Justice, MEREDITH, DRUMMOND,
 MONDELET and BADGLEY, Justices.

CREVIER DIT BELLERIVE, *et al.* *Appellants.*
 and

ROCHELEAU, *et al.* *Respondents.*

Held:—That a contract by a married woman, without marital authority, given and shewn in the deed containing the contract, is invalid.

Renunciations by children to the future successions of their parents, valid and presumed made for the advantage of the other heirs binds the renunciants.

In principle renunciations to future successions of living persons, ineffective, except in marriage contracts of female children.

In this case, the acts of donation and last will made by the testatrix set aside as made by fraudulent captation and suggestion of the parties claiming to hold the estates thereunder.

The said parties having received and held the mass of the estates referred to ordered to account for the same.

Jugé:—Qu'un contrat par une femme mariée, sans autorisation par le mari, donnée par l'acte même contenant le contrat, n'est pas valable.

Les renoncations des enfants aux successions futures de leurs parents, valables et présumées faites pour l'avantage des héritiers lient les parties renonçant.

En principe les renoncations aux successions futures de personnes vivantes, sont inefficaces, si ce n'est dans les contrats de mariage.

Dans l'espèce, l'acte de donation et le testament faits par la testatrice déclarés nul pour cause de captation et suggestion frauduleuses des parties réclamant les successions en vertu d'iceux.

Les dites parties s'étant mises en possession de la masse des dites successions condamnées à rendre compte d'iceelles.

Judgment rendered the 20th December, 1866.

The facts of the case are sufficiently stated in the following observations :—

BADGLEY, Justice:—François Xavier Crevier, Senior, and Marguerite Lefebvre Lacroix, his wife, were *en communauté de biens*, and had five children of their marriage, François Xavier, Pierre Isidore, Louis Isaïe, Marie Josephite and Victorine.

François Xavier, junior, being about to marry, his parents intervened and became parties to his contract of marriage, dated in February, 1816, and therein declared that *desirant l'établir* they give to him a farm land described in the contract and some moveables, stipulating, "laquelle terre et articles seront pour tenir lieu de tous droits tant d'hérédité que de légitime, que le dit François Xavier, junior, aurait pu avoir, prétendre et espérer dans les suc-

"cessions futures de ses dits père et mère, auxquelles il renonce de ce jour à toujours."

Some years after that date, namely, on the fourth November, 1831, the father and mother, the latter duly authorized by her husband, did, by notarial act declare, *que désirant procurer des établissements à leurs fils, Isidore et Isaïe*, they give to Isidore three farm lands, and to Isaïe, four farm lands, all fully described in the *acte*, with all the moveables that the donors had or might have at the time of their decease to be equally divided between the donees, *à demande*, but establishing a community between them until division between them was made; the consideration stated was the joint support of the donors during their lives; and also the support of the niece of the donees, Julie Montplaisir, *tant qu'ils voudraient la garder et l'entretenir*, with the further charge upon them to pay 48 livres, to each of their sisters, in one year after the donors' decease, *laquelle avec ce qu'elles ont reçu en avance serait pour tous droits qu'elles auraient pu espérer par la succession des donateurs*. The donees entered into joint possession of the property as conveyed, they lived together until the death of Isaïe, and never made any partition of the property so given to them.

The father died intestate in 1840, and on the 6th december 1842, Isaïe also died intestate and childless.

Subsequently, by deed of donation *entre vifs* executed on the 6th March, 1843, the mother assuming to herself to control the entire of Isaïe's intestate estate, *désirant donner des marques d'amitié envers son fils Isidore*, gave him five farm lands described in the deed, *et tous et chacuns des biens meubles appartenant à la dite donatrice, ce que dessus donné pour lui être échu par la succession de feu Isaïe son fils décédé*.

The consideration of this deed was her support, as in the *acte* of 1831, the payment to Victorine and Marie Josephite as by that same *acte*, and further the payment of

£18 to Julie Montplaisir, above mentioned, half in each year after that the said Julie shall have left the donor's service, *pour lui procurer un établissement, vu qu'elle a reçu des soins et des tendresses de sa part, et vu son infirmité.* The said Julie was deformed.

Victorine and her husband, Montplaisir, the father and mother of Julie, and Marie Josephte and her husband Rocheleau, all respondents in this appeal, intervened and became parties to this last deed and confirmed it, *et pour assurer la propriété des biens sus-donnés au dit Isidore, ils lui font cession et abandon de tous leurs droits, parts et portions, prétentions et réclamations mobilières et immobilières, fruits et revenus d'iceux, qui peuvent leur être échus ou pourront leur échoir à la suite, dans la succession du dit feu Isaïe, et aussi tous droits et prétentions qui pourront leur appartenir, ou pourraient leur être échus et deviendraient leur échoir par la suite, dans le douaire stipulé au contrat de mariage de leur père et mère, auxquels droits ils renoncent en faveur du dit Isidore, ses hoirs et ayant cause.*

François Xavier, junior, also made a similar cession by an *acte* of March, 1843, and abandoned, in favor of Isidore, his claims and pretensions in the succession of their brother Isaïe, which he also renounces in favor of Isidore, and further renounces to the *douaire* of their mother, and to the estate of the deceased father.

The effect of these renunciations by his sisters and surviving brother, coupled with their mother's conveyance to Isidore under her assumed right of being Isaïe's heir at law for *all* his succession, was to vest in Isidore all the • moveable and immoveable property of their intestate brother, and to render Isidore the sole proprietor of what, up to that time, had been undivided property between these • two brothers.

Isidore died on the 3rd September, 1853, being, up to that time, in possession of all the property given to himself

and to Isaïe by their parents, under the act of 1831, and of all the properties subsequently acquired by themselves.

Following the sequence of the documentary transactions in the cause, it appears, that Isidore having also died intestate and childless, leaving his mother at a most advanced age, and his niece, Julie Montplaisir, behind him in his late residence where both had lived with his late brother and himself, and afterwards with him for many years, this very aged woman is alleged to have freely made two several *actes* before a subscribing notary and witnesses, both dated on the 7th of September, within four days after the death of Isidore, the former of which, was an *acte de donation entre vifs*, whereby she gave and conveyed to the said Julie Montplaisir, and to her father and mother, the entire of her property moveable and immoveable, including therein the entire estate of Isidore, which she claimed to have a right to control and dispose of as his heir at law, and with all that had come to him from Isaïe, and the second, an *acte* of last will and testament by which she confirmed the gifts in the *acte* of donation.

Neither the Rocheleaus, nor François Xavier, junior, benefited by these *actes*. Julie Montplaisir married shortly after, but did not long survive her marriage. She died intestate and childless, and her parents took possession of her estate as her heirs, which covered in fact the estates of Isaïe and Isidore, and of the old woman all together, and such as the old woman was assumed to have given and conveyed to her by the donation *entre vifs* and last will dated the 7th of September, 1853.

As might have been anticipated, the Montplaisirs were not allowed to enjoy this property unmolested, because on the 15th of December, 1853, the Rocheleaus made due application for the interdiction of the old mother, and she was in consequence, after evidence adduced and judicial proceedings had, formally interdicted by judgment of 26th January, 1854. She died sometime afterwards.

The respondents, the Montplaisirs and Rocheleaus, concluding that it was for their interests not to litigate any longer, they finally came to a settlement of their conflicting pretensions respecting all the property held by the former, and agreed to divide the spoil between them. By a deed of transaction, dated the 15th May, 1857, the Montplaisirs transferred to the Rocheleaus a considerable portion of the personal and real property by them acquired in the manner above detailed.

But these dispositions made by the old woman, and the agreements and compromises made by the respondents, did not satisfy the representatives of François Xavier, junior, who did not consider them just or equitable as to them, and were, therefore, driven to this action against the respondents, requiring them to account to them for the estates and property so held by them, at the same time demanding the nullity of the two *actes*, made by the old woman in 1853, and claiming their proper share in the estates: they further claimed by their declaration a variety of other matters to be done and performed by the respondents, the most material of which are settled by the judgment now rendered.

The issues offered by the contestation between the parties cover the various questions of the legality and validity of the renunciation by François Xavier, junior, in his contract of marriage, in so far as his mother was a party thereto: the legal effect and validity of the mother's conveyance to Isidore of the entire estate, personal and real, *propre et acquêt* of Isaïe: the legal effect of the renunciation made in Isidore's favour, by his brother François Xavier, junior, in respect of Isaïe's real estate: and the legal effect and validity of the mother's conveyance to Julie, and her father and mother, by the notarial *actes* alleged to have been executed by the latter, in 1853.

By the judgment of this Court, these last notarial *actes*, made by the old woman, are declared to be null and with-

out effect, having been obtained from her, by fraud and fraudulent suggestions practised upon her, by the Montplaisirs: That difficulty removed, the next one is, as to the effect of the renunciation of François Xavier, junior, in his contract of marriage of 1816, in so far as it affects his mother's succession. Indeed, the whole contestation in this cause between the parties, rests upon this renunciation, which is substantially set up by the respondents, against the appellants' demand.

Now, in the contract containing the renunciation, the father and mother intervened and were parties, but the mother was not authorized as required by law to stipulate and become a party to the contract; the contract was therefore, a legal nullity, in so far as she was concerned, because she was not authorized to contract at all, and therefore, the renunciation by François Xavier, junior, as it affected her estate was invalid and ineffective: "Car l'autorisation maritale est de droit public, et la nullité des actes dans lesquels cette formalité manque sera absolue et pourra par conséquent être alléguée par tous ceux à qui ces actes portent un préjudice quelconque. Telle est en effet la maxime qui forme notre droit commun, et elle est si constante, si absolue, que la femme elle-même ne peut pas se prévaloir des actes qu'elle a fait sans Autorisation, quoiqu'ils soient avantageux; en conséquence de ces principes, et que la Coutume de Paris exigeant pour les actes extrajudiciaires l'autorisation du mari, il faudrait pour les rendre valables que le mari autorisât expressément sa femme." (1)

If the renunciation had been valid it might, other objections not prevailing against it, have availed to the respondents in support of their main contention with the appellants' action, because "de droit commun il suffit que la renonciation soit faite en faveur du père ou de la mère

(1) Guyot, Rept., vbo. Autorisation, p. 816 et seq., referring in support to Pothier de Pare, Lamouignon and Lebrun, who sustain him fully.

“ qui l’a stipulée, et que par cela seul qu’elle est faite en sa faveur, elle est censée faite au profit de tous ses héritiers autres que le renonçant.”

Apart from the foregoing governing principles, renunciations to future successions are not favored by the law, they have been exceptions established by jurisprudence: “ En principe la renonciation à une succession future est contraire au principe qui rejette les conventions relatives à la succession d’une personne vivante, et à celui qui ne permet pas de renoncer à un droit non encore ouvert. Notre jurisprudence a néanmoins admis les renonciations de cette espèce dans les contrats de mariage.”

But they are sustained in these contracts of marriage as regards females particularly, for “ ces renonciations ont particulièrement été autorisées dans la vue de conserver les biens à la famille de celui à la succession duquel on a coutume de faire renoncer les filles en faveur des mâles. Cela se pratique ainsi pour que la splendeur du nom soit mieux soutenue.”

The ground taken in France for giving effect to such renunciations by a jurisprudential exception, and without which it would not have existed at all, has no standing room in this province in any way, and cannot prevail against the rigour of the legal principles above stated, and as being contrary to justice.

But it must be borne in mind that the mother survived both the brothers, who died childless, and hence as settled by the law: “ la renonciation à une succession future demeure sans effet quand ceux au profit desquels elle est faite viennent à mourir avant que la succession soit ouverte, et sans laisser d’enfants.” The brothers of François Xavier, junior, died before his mother’s succession became open; his sisters having no legal right to any advantages from his renunciation, it remained, of course, ineffective as regarded him and his heirs, there being none

for whose profit it could bear any binding effect. Why so? Simply because the object of the law is: "de décider si la renonciation à une succession future produit contre le reconçant un effet réel, c'est-à-dire, si elle le prive du droit effectif de prendre en nature les biens auxquels il a renoncé, car de droit commun les stipulations des contrats relatifs aux immeubles ont leur exécution en nature, un droit réel."

The renunciation being invalid and ineffective in every way deprives the respondents of their really only ground of contestation against the *demande* of the appellants, whilst it leaves these *recti in curia*.

These difficulties, then, being thus also removed, there only remains to ascertain what are the estates in which the appellants have successive rights?

It seems to be admitted that the real property given to Isaïe and Isidore, by their parents, by the *acte* of 1831, were *propres* in those donees, and as such, therefore, clearly within the third share of the appellants. The several intestacies of Isaïe and Isidore necessarily, by law, cast their *meubles et acquêts immeubles* into the hands of their mother as their *héritière*, and her action with reference to Isaïe's *meubles et acquêts*, by which she legally assigned them to Isidore, accumulated into Isidore's hands, all his own and Isaïe's property, consisting of *meubles et acquêts immeubles*, which by the force of law fell to the mother by the death of Isidore himself; in all this mass also, the appellants have their one third successive rights.

The judgment, therefore, decrees the nullity of the renunciation made by François Xavier, junior, to his mother's succession, contained in his contract of marriage; the maintenance of the conveyance made to Isaïe and Isidore, by their parents, by the *donation* of 1831; the possession by Isidore, of his deceased brother, Isaïe's property, moveable and immoveable, as proprietor thereof; the inheritance in Isidore's *propres* by the appellants and respondents, each

for one third, and in his mother's inheritance of their *meubles et acquêts immeubles*; the nullity of the donation and last will dated the 7th September, 1858; the non disposal by the late dame Marguerite Lefebvre Lacroix, of her estate at her decease, and the actual possession by the respondents of the succession of Isidore and of their late mother, and their liability to account to the appellants, for one third part in each. The judgment then orders the respondents to make an inventory of the estates in legal form and to account to the appellants, for all the said property moveable or immovable, and failing the respondents to make inventory and to render account, the party failing to pay to the appellants £500. The whole with costs to the appellants in both Courts.

The Court, &c.—“ 1° Considering that the renunciation by the said late François Xavier Crevier dit Bellerive, the younger, to the estate and succession of the said late dame Marguerite Lefebvre Lacroix, his mother, in his contract of marriage with Marie Anne Toupin, executed before Dumoulin and his colleague, notaries, on the first day of February, 1816, to which said contract, the said late François Xavier Crevier dit Bellerive, the elder, and the said late dame Marguerite Lefebvre Lacroix, his father and mother, intervened for the purposes therein contained, was absolutely null and void and of no binding legal effect as regards the said François Xavier Crevier dit Bellerive, the younger, and as regards the said appellants, his legal representatives, the said dame Marguerite Lefebvre Lacroix not having been authorised, as required by law, to be or become a party to the said contract of marriage, nor to make the stipulations and agreements therein contained :

“ 2° Considering that, by the act or deed of *donation entre-vifs*, filed in this cause, and executed before Craig and his colleague, notaries, on the 4th day of November, 1831, the said François Crevier dit Bellerive, the elder, and the said Marguerite Lefebvre Lacroix, did give and convey to their other two sons, Isaac Crevier dit Bellerive and Isidore

Crevier dit Bellerive, brothers of the said François Crevier dit Bellerive, the younger and of the said respondents, Marie Josephite and Victorine Crevier dit Bellerive, *à titre universel*, in the portions and in the manner in the said donation set forth, all the moveable and immoveable properties to them, the said donors, generally belonging and appertaining at the date of the said donation, with the stipulation therein contained, that the said properties so given and the revenues thereof, should be held in common by and between the said donees, did then and there jointly enter upon and take possession, and did jointly hold and possess the same as proprietors thereof:

“ 3° Considering that the said François Xavier Crevier dit Bellerive, the elder, deceased on the 15th day of July, 1840, intestate and without leaving any property whatever, and that the said Isaïe Crevier dit Bellerive, also deceased on the fourth day of December, 1842, intestate and childless, *sans hoirs de son corps, ni descendants de lui*:

“ 4° Considering that, by the decease of the said Isaïe Crevier dit Bellerive, as aforesaid, and by the effect of the renunciations to his estate and successions severally made in favour of the said Isidore Crevier dit Bellerive by the said François Xavier Crevier dit Bellerive, the younger, by act or deed executed by him before Cadieux, and his colleague, notaries, at Montreal, on the first day of March, 1843, filed in this cause, and by the said respondents in and by the said act or deed of donation filed in this cause, executed before Craig and colleague, notaries, on the sixth of March, 1843, in favour of the said Isidore Crevier dit Bellerive, and by the effect of the donation in the said last mentioned act or deed of donation contained, whereby the said Marguerite Lefebvre Lacroix, the therein donor, and by law the heiress, *héritière des meubles et acquêts*, of her said deceased son, Isaïe Crevier dit Bellerive, assuming in and by the said act to be his general heiress, did give and convey to the said Isidore Crevier dit Bellerive, all the

property and estate in general, moveable and immoveable of the said late Isaie Crevier dit Bellerive, including therein his said *meubles* and *acquêts*, the said Isidore Crevier dit Bellerive, then and there, by the effect of the said premises did become the legal possessor of all and every the estate and effects, and of all and every the property moveable and immoveable of the said late Isaie Crevier dit Bellerive, and did thenceforth, hold and possess the same as the absolute proprietor thereof :

“ 5° Considering that, by the decease of the said Isidore Crevier dit Bellerive, on the third day of September, 1843, intestate and childless, *sans hoirs de son corps, ni descendants de lui*, and by law, the said appellants and the said respondents became and were his heirs and legal representatives, each for one third part of the *propres* of his estate and succession, and also, the said Marguerite Lefebvre Lacroix, his mother became and was his heiress, *héritière*, of the *meubles* and *acquêts* of his said estate and succession :

“ 6° Considering that the said several *actes* or deeds of donation filed in this cause, in favour of the late Julie Montplaisir and of the said Paschal Montplaisir and Victorine Crevier dit Bellerive, his wife, two of the said respondents, the father and mother of the said late Julie Montplaisir, and also, the said *acte* or last will and testament, also filed in this cause, the said *actes* or deeds of donation last referred to and the said last will and testament, purporting to have been made and executed by the said Marguerite Lefebvre Lacroix, before Craig, and witnesses, on the seventh day of September, 1853, were so executed simultaneously, at the same time and place, and before the same notary and witnesses, and were so severally made and executed by and through and in fraud of the said appellants, and by the captation and suggestions of the said donees to be benefited thereby; and when the said Marguerite Lefebvre Lacroix, from her advanced age, was imbecile and unable to direct and govern her own affairs :

" 7° Considering that for the causes aforesaid, and by and upon the demand of the said appellants in their declaration as amended in this cause filed set forth, and also as demanded in and by their answer and replication, *réponses et répliques* to the *exceptions perpétuelles péremptoires en droit* by them made and filed to the pleas of the respondents, the said several *actes* or deeds of donation last referred to, and the said last will and testament, both purporting to have been so severally executed by the said Marguerite Lefebvre Lacroix, are, and are declared to be, null and void, and are and should be of no effect against the said appellants :

" 8° Considering, therefore, that the estate and succession of the said late Marguerite Lefebvre Lacroix, at her decease, on the eleventh day of August, 1855, was not legally disposed of and was intestate, and that the said appellants and the said respondents were by law her heirs and legal representatives, each for one third part of her said estate and succession :

" 9° Considering that by the decease of the said late Julie Montplaisir, on the seventeenth day of January, 1857, *intestate* and *sans hoirs de son corps ni descendants d'elle*, the said Paschal Montplaisir and Victorine Crevier dit Bellerive, his wife, her father and mother, became and were her legal heirs and representatives, and that under and by virtue of the said last recited *actes* or deeds of donation so as aforesaid made in her and their favour, and under and by virtue of the said last will and testament, and further under and by virtue of the said *acte* or deed of transaction filed in this cause, executed before Guillet, and his colleague, notaries, on the fifteenth day of May, 1857, between the said respondents, to wit, the said Paschal Montplaisir and Victorine Crevier dit Bellerive, his wife, of the one part, and the said George Rocheleau and Marie Crevier dit Bellerive, his wife, of the other part, for the divi-

sion and settlement between them, of the properties and effects mentioned and referred to in the recited deeds of donation and last will, they, the said respondents, did acknowledge to have entered into and taken possession in manner in the said *acte* or deed of transaction mentioned and detailed, of the said estates and successions of the said late Isidore Crevier dit Bellerive, and of the said late Marguerite Lefebvre Lacroix, and of all and every the moveable and immoveable property and effects to the said estates belonging, to the exclusion of the said appellants and of their rights therein.

“ 10° Considering that the said respondents are, therefore, liable to render and restore to the said appellants, their one third part or share in the *propres* of the said estate and succession of the said late Isidore Crevier dit Bellerive, and their one third part or share of the general estate and succession of the said late Marguerite Lefebvre Lacroix, and also, to render to the said appellants an account of the said estates and successions so by them possessed as aforesaid :

“ 11° Considering that, in the judgment rendered by the Superior Court of Lower Canada, sitting in the district of Three-Rivers, on the 13th of December, 1860, there is error, and proceeding to render the judgment which the said Superior Court ought to have pronounced : This Court doth adjudge and order that, for the considerations herein before mentioned, and for the purpose of settling and establishing the said estate of the said late Isidore Crevier dit Bellerive and Marguerite Lefebvre Lacroix, between the parties, appellants and respondents, and according to their hereinbefore declared portions or shares therein respectively, an inventory, in due form of law, shall be made by the said parties, of the said last mentioned estates and successions, by some competent notary public, for that purpose to be nominated and agreed upon by the said parties jointly, and upon their failure or disagreement to

make such nomination, then by the resident Judge of Three-Rivers, in the hands of which said notary, for the purposes of the said inventory, shall be placed and deposited all the vouchers, papers and documents in the possession of any of the said parties having relation to the said estates, and for such purpose, the said notary shall have access to the papers, documents and exhibits of record in this suit: and it is ordered that a copy of the said inventory shall be filed of record in this cause, by the said notary, to be thereupon proceeded and acted upon as may be required according to law, and further, the said respondents, severally, are adjudged and ordered to make and render to the said appellants a just and true account under oath in due form according to law, of all and every the property, moveable and immoveable, by them received and had of and from the said last mentioned estates and successions, and of all the rents, issues, interests and profits thereof or therefrom, from the time of their severally receiving or taking possession of the same or any part thereof: and upon failure by the said respondents or either of them, to wit, of the said Paschal Montplaisir and Victorine Crevier dit Bellerive, his wife, and of the said George Rocheleau and Marie Crevier, his wife, to make such inventory or to make or render to the said appellants such account aforesaid, such, as shall be in default of so doing, shall be and are hereby adjudged and condemned to pay to the said appellants the sum of £500 with interest thereon from this date: And this Court doth reserve to the said appellants their right to *débattre* the said account, and to take such other and further conclusions in the premises as they may be advised and as shall be according to law, after the filing of the said inventory and the making and rendering of the said account: And it is ordered, that the said inventory shall be filed in this cause, and the said accounts shall be made and rendered within two months after this date.

“ Finally, this Court doth condemn the said respondents

to pay to the appellants the costs of suit in the Court below, and also, the costs of this Court."

Dissentiente, the Honorable the Chief-Justice, upon one point only.

BARNARD, for appellants.

LOBANGER & LOBANGER, for respondents.

SUPERIOR COURT.—MONTREAL.

IN REVIEW.

Before :—BADGLEY, BERTHELOT and MONK, Justices.

No. 609.	{	DEAL..... <i>Plaintiff</i> .
		THE CORPORATION OF THE TOWN OF PHILLIPSBURGH..... <i>Defendants</i> .

VS.

In an action against a local municipality for a *trouble*, in entering upon plaintiff's land, and making a road, and for the damages thereby occasioned.

Held :—That a municipality cannot avoid responsibility by invoking a *procès-verbal* of a county council duly homologated, ordering the making of a road ; inasmuch as no valuation of the amount of compensation to be paid to the plaintiff, proprietor of the land taken, had been made in conformity with the Municipal and Road Act of Lower Canada, sec. 50, (1) and that in so entering they had caused a *trouble* to the plaintiff, and were liable in damages.

Dans une action contre une municipalité, locale pour *trouble*, résultant de prise de possession d'une partie de la terre du demandeur pour y faire un chemin, et pour dommages en conséquence.

Jugé :—Qu'une municipalité ne peut éviter sa responsabilité en invoquant un *procès-verbal* d'un conseil de comté dûment homologué, ordonnant la confection d'un chemin ; en autant qu'une valuation de la compensation qui devrait être payée au demandeur, propriétaire du terrain, n'avait pas été faite en conformité à l'acte des municipalités et des chemins du Bas-Canada, sec. 50, et qu'en prenant ainsi possession un *trouble* avait été causé au demandeur, et que la municipalité était responsable en dommages.

Judgment rendered the 31st March, 1866.

This cause came up for review from final judgment rendered on the 24th of October, 1865, in the Superior Court, at Nelsonville, JOHNSON, Justice, which dismissed the plaintiff's action. The action was brought complaining of a *trouble* by the defendants in entering upon the plaintiff's land, praying that the defendants be condemned to desist from the *trouble* and to pay \$400 damages.

(1) Con. Stat. L. C., Chap. 24.

The first plea set up a *procès-verbal* of the county council of the county of Missisquoi, establishing a road across the plaintiff's land ; that the making of part of this road devolved upon the defendants, who had entered upon the plaintiff's land under the authority of the *procès-verbal* and were not liable to the plaintiff. 2nd plea, general denegation. To the first plea, the plaintiff filed a special answer, setting up the nullity of the *procès-verbal*, and that even if it had been regular and legal, it could not vest the plaintiff's land in the defendants until the formalities of the municipal act, sec. 50, sub-secs. 1 to 9, had been complied with, and the plaintiff compensated for his land, or until a report had been made by the valuator determining that he was not entitled to any compensation. A demurrer was filed by the defendants to this answer, on the ground that the plaintiff was bound to seek redress under the prerogative writ act, or to have taken other direct proceedings to have the *procès-verbal* set aside. This demurrer was dismissed by MCCORD, Justice, and on the merits, judgment rendered dismissing the action on the ground " that the defendants had proved the material allegations of their first plea."

Grounds urged by the plaintiff at the hearing in review :

1° The notices were not read at the church door of St. Armand, sec. 6, and were not certified under oath as required by sec. 9, municipal act.

2° *Procès-verbal* did not state whether road was to be a front road, or a by-road, sec. 40, sub-secs. 5 to 11 ; sec. 45, sub-sec. 4, and was not homologated at a special session as required by sec. 46, sub-sec. 10, and was amended and the road widened by same proceeding, whereas it could only be amended by a new *procès-verbal*, sec. 45.

3° Parties interested not heard ; sec. 46, sub-sec. 16.

4° County council had no jurisdiction, as the whole of

the road lay within the parish of St. Armand West, and did not lead from one county to another.

5° Non compliance with sec. 50, sub-secs. 1 to 9, as to compensation for road, or report of valuers that no compensation was due.

6° The 71 sec. of the act as to formalities did not apply, as this was an action at common law, and under the act. (1)

Points urged in review by the defendants :

1° Only two notices were necessary, first, of superintendent's *visit*, which was not ordered by Council, and therefore not required ; (2) second, of meeting of Council for revision of report of special superintendent. The plaintiff presented a petition at this meeting, opposing the homologation of the report. The notices were read at St. Paul's church, the parish church of St. Armand West, although within a village municipality.

2° Homologation at a special session. The statute is only directory, and if no special session was held the *procès-verbal* was homologated " by remaining deposited in the " office of the Council, without having been homologated " or amended, for 30 days after the time when such special " session was, or should have been, held."

3° Jurisdiction of Council. The road was partly in the municipality of the village of Phillipsburgh and partly in the parish of St. Armand, therefore it had jurisdiction.

4° The road did not, it is true, *vest* in the Council till

(1) Authorities in support of special answer :

McDougall vs. Corporation of Upton, 5 L. C. Jurist, p. 229 :—*Keys vs. Quebec Fire Ins. Co.*, Stuart's Rep., p. 425 :—*Ex parte Rudolph vs. Harbor Commissioners*, 1 Jurist, p. 47 :—*Corporation of Verchères vs. Boutillet*, 2 L. C. Jurist, p. 115 :—*Ex parte Dallimore*, 11 L. C. Rep., p. 436 :—*Gould vs. Corporation of Montreal*, 3 L. C. Jurist, p. 197 :—*Corporation of the County of Yamaska and Rhéaume*, 12 L. C. Rep., p. 488 :—*Morkill vs. Heath*, 15 L. C. Rep., p. 408.

(2) Municipal Act, sect. 45.

compensation was paid, but the statute does not require compensation to be paid *before entry*, rather the reverse. (1) This is in conformity with the statutes for forming companies for the improvement of rivers, railway companies' acts, where an entry is permitted before payment for the land taken.

5° The defendants were bound to make the road, but the corporation of the parish of St. Armand, the plaintiff's parish, in which he was a councillor, was bound to pay for the land, and proceedings should have been adopted to enforce payment, so as to compel that parish to proceed as directed in sec. 50.

BADGLEY, Justice:—Stated pleadings, and said that although a variety of objections had been urged against the regularity of the proceedings in laying out and making the road, it was unnecessary for the Court to decide *seriatim* upon them all. One thing was to be noticed, namely, that the 71 sec. of the municipal act, which states that "no objections of mere form or founded on the omission of any formality shall be allowed to prevail in any action, suit or proceeding under this Act, unless substantial injustice would be done by not allowing such objection," is only applicable to matters of mere form, and not to matters affecting the substantial rights of parties. This Court held that under the 50th section of the municipal act, the plaintiff was entitled to have compensation for the land taken, or that it should be determined, as required by law, that no compensation was due. The local council in proceeding without any valuation, and without the certificate of value having been delivered to the secretary-treasurer, went too fast. It was on compliance with their requirements that the road was vested in the municipality, and the plaintiff was well founded in his action. The settlement of the compensation for land taken, should have pre-

(1) See sect. 50, sub-secs. 4, 9, 10, and 25 Vict., cap. 14, sect. 2.

ceded the entry, the amount of the compensation, if any, should have been fixed, and the defendants had no legal authority to make the road until this was done.

The judgment must therefore be reversed :

Judgment in review :—" Considering that all and every the objections severally set forth and contained in the plaintiff's special answer, in this cause filed to the defendant's plea to the plaintiff's action, in this behalf, and also, severally taken by the said plaintiff in his *factum*, in this Court, filed in this cause, against the said judgment, save in the special particular objection hereinafter stated and mentioned in the said special answer, and *factum*, are not founded and should be set aside :

" Considering that the said special and particular objection alone is well founded ; to wit : that no estimation had been made in the manner and according to the provisions of the statute in that respect, of the value of the piece of land belonging to the plaintiff, required for the making of the said road, mentioned in the declaration and pleadings in this cause filed, whereby to authorize the said defendants to enter upon the said parcel of land, and to commence operations thereon, for the making of the said road :

" Considering that without such previous observance of the requirements of the said statute, the said defendants did enter upon the said piece of land, and commenced their operations thereon, without legal authority, and the said plaintiff did thereby suffer damage to the amount of twenty-five dollars currency, this Court doth revise the judgment and maintain the plaintiff in the possession of the lot, and condemns the defendants to cease to molest plaintiff and to pay \$25, &c."

O'HALLORAN & BAKER, for plaintiff.

ROBERTS, for defendants.

CIRCUIT COURT.—MONTREAL.

Before:—BADGLEY, Justice.

No. 6346. { BRUNET.....*Plaintiff*.
 { vs.
 { LALONDE, *et al*.....*Defendants*.

Held:—That a note *en brevet* payable to A. B. or his order, cannot be indorsed by a blank indorsement:

Semble: That it may be by indorsement in full.

Jugé:—Qu'un billet *en brevet* payable à A. B., ou ordre, ne peut être endossé par un endossement en blanc.

Il semble: Qu'il peut être endossé par endossement spécial.

Judgment rendered the 30th April, 1866.

This was an action brought to recover \$60, amount of a note or obligation passed before notaries, *en brevet*, signed with a cross by Lalonde, one of the defendants, in favor of Elzéar Labelle, advocate, or order, the other defendant, by whom it was also signed and indorsed in blank to the plaintiff. Protest was made in the form usual in cases of promissory notes. The plea firstly pleaded was to the effect that the note was not legally transferred to the plaintiff, the indorsement being in blank and without date.

BADGLEY, Justice.—Stated pleadings, and said that an instrument of this kind, *en brevet*, had been held by the Court of appeals, in a case of Séguin and Langevin, to be a promissory note. It was not however a promissory note under the statute, and it could not be transferred by an indorsement in blank. (1) He had no doubt it might be legally transferred by indorsement in full.

Action dismissed.

BRUNET, for plaintiff.

BELANGER and DESNOYERS, for defendants.

(1) See *contra*, Morin et Legault dit Deslauriers, 3 L. C. Jurist, p. 55, SMITH, J.

SUPERIOR COURT.—MONTREAL.

Before :—MONK, Justice.

No. 1513. { MCINTOSH, *et al* *Plaintiffs*.
 { vs.
 { BELL..... *Defendant*.

To an action brought to enforce a sale by an auctioneer of certain real estate according to a memorandum of purchase signed by the defendant, and praying that defendant be condemned to take a title and to pay the instalment to become due at the passing of the deed, and to create a mortgage and insure the property as security for the balance of the *prix de vente*, within a time to be fixed by the Court, and in default thereof, that the judgment should avail as a title under the condition or memorandum; the defendant pleaded that he had just cause to fear being troubled by a substitution created by the will of the plaintiffs' father, in favor of the children of the plaintiffs, and that the sheriff's title invoked by the plaintiffs, and obtained on a *délaissement*, made by them in a cause brought by their mother, widow of the testator, was not valid, but was obtained by concert to get rid of the substitution.

Held:—1o. That the defendant had just cause to fear that he would be troubled by reason of the matters set up in the plea.

2o. That inasmuch as the plaintiffs demanded an immediate condemnation for the instalment payable at the passing of the deed, and had not offered security, nor the defendant demanded such security, the Court had no power to order it to be given.

3o. That, therefore, and inasmuch as the defendant was not liable to be condemned to pay, without security, the action must be dismissed with costs.

Dans une action portée pour contraindre l'exécution d'une vente par un encanteur de certain immeuble suivant promesse d'acquisition signée par le défendeur, et concluant à ce que le défendeur prit titre et fut condamné à payer le versement qui devait échouer lors de la passation de l'acte, et de donner une hypothèque et d'assurer la propriété pour le montant de la balance du prix de vente, dans un délai à être fixé par la Cour, à défaut de quoi le jugement vaudrait titre aux conditions énoncées en la promesse; le défendeur plaida qu'il avait juste droit de craindre un trouble en raison d'une substitution créée par le testament du père des demandeurs, en faveur des enfants des demandeurs, et que le titre du shérif invoqué par les demandeurs, et obtenu sur *délaissement* fait par eux dans une action portée par leur mère, veuve du testateur, n'était pas valable, en raison de ce qu'il avait été obtenu dans le but de se débarrasser de la substitution.

Jugé:—1o. Que le défendeur avait juste cause de craindre un trouble en raison des matières alléguées dans le plaidoyer.

2o. Qu'en autant que les demandeurs concluaient à une condamnation immédiate pour le versement payable lors de l'exécution de l'acte, et n'avaient offert aucune garantie, ni le défendeur demandé telle garantie, la Cour ne pouvait ordonner qu'elle fut fournie.

3o. Que, par conséquent, et en autant que le défendeur ne pouvait être condamné à payer sans garantie, l'action devait être renvoyée avec dépens.

Judgment rendered the 31st March, 1866.

The declaration in the cause set up a sale of a house and lot of land in the city of Montreal, made on the 14th March, 1865, to the defendant, through John Leeming & Co., auctioneers, for £1325, and that the defendant signed the conditions of sale and acknowledged to have purchased the premises in question, for the sum mentioned, payable

one fourth down, and the remainder in four annual instalments, with interest, and set up a sale of the same premises to the plaintiffs, by the sheriff of the district of Montreal, on the 30th April, 1858, in an action brought by Patty Bent, widow of the late Peter McIntosh, against the now plaintiffs, Isabella McIntosh and Frances McIntosh, (two of his daughters) as defendants. Conclusion : that the sale by the auctioneers be declared binding on the defendant, and that he be condemned to pay one fourth of the price, and to take a deed of the property on the memorandum of sale, within a delay to be fixed, and to pay the balance of the price in four annual instalments at dates mentioned, and to create a mortgage upon the property and insure it as mentioned in the memorandum, for securing the balance due on the *prix de vente*, "and that, in default of the " defendant so doing, as aforesaid, that the judgment of the " Court do avail the parties as a title deed to the said property, subject to all the conditions and to the price as " aforesaid, and that the defendant be ordered to pay to the " plaintiffs the sum of \$100 damages, as aforesaid."

The plea admitted the purchase according to the auctioneers' conditions, and set up certain clauses in the last will and testament of Peter McIntosh, under which it was contended that a substitution had been created in favor of the children of the now plaintiffs; and alleged that the sheriff's sale referred to had been obtained by concert and understanding with their mother, after her second marriage, and was effected solely to get rid of the substitution; that there were no debts of the testator, which could have rendered necessary the sale by the sheriff of the property in question, and that, therefore, the title of the plaintiffs as *adjudicataires*, on a *délaissement* made by them in the case mentioned in the sheriff's deed, was no better than it was under the will itself. Conclusion to dismiss action.

MONK, Justice.—Stated pleadings, and held that the de-

defendant had good cause to fear trouble from the substitution set up as existing under the will of Peter McIntosh ; the adjudication to the now plaintiffs of the property in question for \$800 was to get rid of that substitution. The defendant set up this as cause for not taking a deed. He did not ask for security nor did the plaintiffs offer to give any, and the Court had no authority under these circumstances to order security to be given or received.

There was another point connected with the form of action which prevented a judgment from being rendered, to the effect that the defendant should take a deed on getting security ; the plaintiffs' declaration prayed for an immediate condemnation against the defendant for the one fourth of the *prix de vente*, which was payable in cash on the passing of the deed. This could not be given without security. There being just ground of fearing a trouble, the defendant was entitled to demand security before being condemned to pay the price. He did not think that under the issues raised, he could order security to be given, and he could not condemn the defendant to pay the price without security. He therefore held that the action must be dismissed.

Judgment:—" Considering that in and by their action and *demande*, the said plaintiffs seek not only that the defendant be condemned to take the title by them tendered, but also that he be adjudged and ordered to pay them the sum of \$1325 currency, being the first instalment of one fourth part of the purchase money for the lot of land and premises purchased by defendant, with interest thereon from 15th May, 1865, until paid :

" Considering that the defendant, by the facts disclosed by the evidence adduced, has just cause to fear that he will or may hereafter be troubled by a revendicatory action, or otherwise, by and on behalf of the *appelés* to the substitution created by the last will and testament of the late Peter McIntosh :

"Seeing that the defendant has not demanded security against the consequences of such trouble and that the plaintiffs have not offered or tendered such security: Considering that the Court hath not the power to order such security under the issues joined in this cause, and seeing, finally, that the said defendant cannot by law be compelled to pay the said sum of \$1325, and interest, as aforesaid, until and after the security above mentioned be given, and that, consequently, no condemnation for the payment of the same can legally issue or be given in this cause, doth dismiss the plaintiffs' action, with costs, &c., saving, to the said plaintiffs, their recourse as to law and justice may appertain."

TORRANCE & MORRIS, for plaintiffs.

DAY & DAY, for defendant.

COUR DE CIRCUIT.—QUEBEC.

Présent:—TASCHEREAU, Juge.

No. 755.	{	GIBSONE <i>Demandeur.</i>
		VS.
		JAMIESON, <i>et vir</i> <i>Défenderesse.</i>
		et
		HEALY <i>Opposant.</i>

Jugé:—1o. Que lorsqu'une opposition afin d'annuler n'est pas revêtue des timbres exigés par la loi, la Cour permettra, sur motion du demandeur, de procéder à la vente des effets saisis, nonobstant telle opposition.

2o. Que ce n'est que par voie d'appel, ou par une requête civile, (suivant le cas) et non par une opposition afin d'annuler, qu'on peut demander et obtenir la réformation ou l'annulation d'un jugement ou ordre interlocutoire.

Held:—1o. That when an opposition *afin d'annuler* is not stamped according to law, the Court will, upon motion of the plaintiff, give leave to proceed to the sale of the effects seized, notwithstanding such opposition.

2o. That it is only by means of an appeal, or of a *requête civile*, (as the case may be) and not by means of an opposition *afin d'annuler*, that the reforming or setting aside of an interlocutory judgment or order can be obtained.

Jugement rendu le 25 avril, 1866.

Le demandeur ayant obtenu jugement contre la défenderesse et fait émaner un writ de *fi. fa. de bonis*, Healy,

le mari de la défenderesse, s'opposa à la saisie pratiquée en vertu du dit writ par une opposition afin d'annuler.

Le demandeur obtint, par jugement interlocutoire, sur motion par lui faite à cet effet, la permission de procéder à la vente des effets saisis, nonobstant cette opposition, sur preuve qu'elle n'était pas revêtue des timbres exigés par la loi, et fit émaner un writ de *venditioni exponas*.

L'opposant produisit une nouvelle opposition afin d'annuler à ce writ, alléguant que le jugement interlocutoire, permettant au demandeur de procéder à la vente des effets saisis, avait été obtenu irrégulièrement, illégalement, par surprise, nonobstant l'opposition afin d'annuler encore en litige, hors la connaissance de l'opposant, sans lui en donner avis préalable, le mettant par là dans l'impossibilité de faire connaître à la Cour qu'il avait apposé les timbres nécessaires à sa première opposition, et concluant à l'annulation du dit jugement interlocutoire.

Le demandeur répondit à cette opposition par une défense au fonds en droit, disant, que l'opposant ne pouvait faire annuler un jugement interlocutoire par une opposition afin d'annuler, et que d'ailleurs, il n'avait obtenu d'aucun juge la permission de produire cette opposition.

Jugement.—La Cour considérant que l'opposant, John R. Healy, ne peut, au moyen d'une opposition afin d'annuler, faire réformer ou annuler le jugement ou ordre dont il se plaint, et que ce n'est que par la voie d'appel, ou de la requête civile, (suivant le cas) qu'il pouvait demander et obtenir la réformation ou l'annulation de tel jugement ou ordre : Considérant, qu'en autant la défense en droit du demandeur à la dite opposition est bien fondée, la Cour maintient la dite défense au fonds en droit du demandeur à la dite opposition du dit John R. Healy, et renvoie la dite opposition, avec dépens.

SEWELL, procureur du demandeur.

CAIRNS, pour l'opposant.

COUR SUPERIEURE.—QUEBEC.

Présent :—TASCHEREAU, Juge.

No. 1642. { EVANTUREL, *et vir*.....Demandeurs.
VS.
{ EVANTURELDefendeur.

1o. Tout individu a le droit de disposer comme bon lui semble de ses biens, sans être obligé d'expliquer ses motifs, ses raisons.

2o. Tout testateur est supposé être, au moment de son testament, en possession de son intelligence à un degré suffisant pour tester d'une manière légale, en un mot, que la possession de l'intelligence est l'état normal de l'être humain, à moins que cet individu n'ait été privé de l'exercice du droit de tester par une interdiction judiciaire, et :

Juge :—1o. Qu'il incombe à celui qui attaque un testament comme fait par une personne incapable de tester par suite de faiblesse d'esprit, de prouver cette faiblesse d'esprit, et que le légataire n'a qu'à se tenir sur la défensive.

2o. Que le testament *ab irato* n'est pas par lui-même frappé de nullité, à moins qu'il ne soit le fruit du dol, de la suggestion et de la captation.

3o. Que le dol, la fraude, le défaut d'intelligence sont les bases de la captation et de la suggestion.

4o. Que la volonté d'un testateur, sain d'esprit, mémoire et entendement, sans suggestion et captation, fruits de la fraude, seule justifie les dispositions testamentaires, *sic volo, sic jubeo*.

5o. Que, dans l'espèce, les demandeurs ont failli de prouver suggestion ou captation, de la part du défendeur, accompagnées de faiblesse d'intelligence chez la testatrice.

1o. Every person has a right to dispose of his estate as he may think right, without being obliged to express his motives or give his reasons.

2o. Every testator is supposed to be, at the moment of his will, sufficiently in possession of his intellect to enable him to will in a legal manner, in fine, that the possession of one's intellect is the normal state of a human being, unless the individual has been deprived of the exercise of his right to make a will by judicial interdiction, and :

Held :—1o. That it is incumbent upon him who attacks a will as made by a person incapable of disposing by will, by reason of weakness of intellect, to prove such weakness, and that the legatee need only keep upon the defensive.

2o. That the will made *ab irato* is not in itself null and void, unless it be the result of fraud, of suggestion and of captation.

3o. That deceit, fraud, and the absence of intellect are the bases of captation and of suggestion.

4o. That the will of a testator, sound of mind, memory and understanding, without suggestion and captation, the results of fraud, is alone sufficient to justify testamentary dispositions, *sic volo, sic jubeo*.

5o. That, in the case submitted, the plaintiffs have failed to establish suggestion or captation, on the part of the defendant, accompanied by feebleness of intellect in the testatrix.

Jugement rendu le 16 Mai, 1866.

TASCHEREAU, Juge :—La cause actuelle m'est soumise pour adjudication sur certains points dont la discussion, par le jugement de la Cour du Banc de la Reine, ne pouvait avoir lieu en même temps que l'inscription de faux. La Cour d'appel, par son jugement du mois de juin, 1865, a renvoyé cette inscription de faux, déclaré que la rédaction du testament de feu madame Evanturel, attaqué par cette inscription, avait été accompagné des formalités légales, et

que le testament avait été dicté et nommé conformément à la loi. Quoique ce jugement n'ait été prononcé que par une majorité d'une voix par un tribunal composé de cinq juges, il a et doit avoir vis-à-vis de tous la même force que s'il eut été unanime. Tous, parties et juges, lui doivent respect et soumission à un même degré. Ce même jugement a également ordonné que les demandeurs procédassent à la preuve des autres moyens par eux invoqués à l'encontre de la légalité de ce testament, savoir : ceux consistant en allégations de l'incapacité de madame Evanturel de faire ce testament, des reproches de suggestions et de captation faits au défendeur. (1)

Les demandeurs, par cette partie de leur réponse spéciale à l'exception péremptoire en droit perpétuelle du défendeur qui a trait à ces moyens, disent que ce testament n'est pas l'expression de la volonté de feue madame Evanturel, parce que lors de sa confection elle était atteinte depuis plus d'un an d'une maladie qui avait affaibli ses forces physiques et influé sur son esprit, affaibli ses facultés mentales, enlevé l'énergie et la force nécessaires pour posséder une volonté distincte et pour l'exprimer clairement, et pour résister aux suggestions du défendeur.

Les demandeurs allèguent que même avant sa dite maladie, madame Evanturel, vu son peu de connaissance et d'éducation, n'aurait pu faire un testament comme celui invoqué par le défendeur.

Ils allèguent que depuis plusieurs années avant la date du testament, le défendeur, fils unique de la testatrice et aîné de sa famille, avait usurpé un contrôle absolu sur sa mère, sur tous ses biens, et qu'il avait par des moyens illégaux capté la faveur de sa mère, réussi à éloigner ses sœurs et leurs époux de la présence de leur mère, et à indisposer cette dernière contre ses enfants, (filles et gendres) et l'empêcher de partager sa fortune également entre

(1) 15 Dée. du B. C., p. 321.

tous ses enfants comme elle avait l'intention de faire, et ce pour s'assurer la totalité de la succession de sa mère.

Ils allèguent que si madame Evanturel a consenti à ce testament, elle ne l'a fait que pour céder aux menaces et suggestions du défendeur.

Ils énoncent que madame Evanturel a déclaré regretter ce testament et s'être laissée surprendre, et que le défendeur, dans le but d'empêcher sa mère de changer son testament, a éloigné les étrangers de sa mère, et qu'il s'est opposé à ce qu'elle laissât sa demeure (celle du défendeur.)

Et les demandeurs concluent au rejet de ce testament.

Comme on peut s'en convaincre, les reproches des demandeurs sont sévères, graves et pertinents, et de nature à invalider ce testament si la preuve corrobore ces allégations de conduite frauduleuse, de captation et de suggestions de la part du défendeur, accompagnées de faiblesse de volonté et d'intelligence chez la testatrice.

L'enquête en cette cause a constaté un assez grand nombre de faits que je réciterai comme préparation au commentaire et à l'appréciation des faits de fraude et de suggestion et captation reprochés au défendeur.

Madame Evanturel était une personne sans éducation, pouvant lire l'impression, mais ne sachant ni écrire ni signer son nom. Sans être douée d'une haute intelligence, elle avait un excellent jugement et un excellent caractère, mais bien déterminée, et suivant l'expression énergique d'un témoin, "*quand elle avait dit oui, c'était oui.*"

Elle avait épousé, en 1820, feu François Evanturel, son mari, décédé en 1852, et de son mariage avec lui sont nés cinq enfants, y compris la demanderesse et le défendeur.

M. Evanturel, père, laissa une fortune assez considérable à sa mort, arrivée en mai, 1852, et par son testament du

13 mai, 1852, M. Evanturel laissa au défendeur l'usufruit de sa moitié dans un emplacement situé sur la rue Saint-Louis, à Québec, et la propriété aux enfants du défendeur. Il laissa à sa femme, madame Evanturel (la testatrice), la jouissance et usufruit du reste de tous ses autres biens meubles et immeubles, à la charge de payer une rente annuelle et viagère de £60 à chacune de ses filles, et re-versible sur le mari de celle de ses dites filles qui décéderait avant sa dite épouse, et il donna la jouissance du reste de ses dits biens meubles et immeubles à ses enfants par part égale, et la propriété aux enfants de ses dits enfants, et il fit de plus quelques autres dispositions assez peu importantes. Le 14 mai, 1852, madame Evanturel fit un premier testament, absolument semblable à celui de son mari, *mutatis mutandis*, et quatre jours après M. Evanturel quitta cette vie.

De 1852 à 1860, il ne s'est rien passé d'extraordinaire que l'enquête en cette cause ait constaté. Mais en juin, 1860, M. Rémillard épousa son épouse actuelle, dame Emilie-Malvina Evanturel. Il y a preuve que lors de la réunion de famille à la suite du mariage, quelques discussions un peu vives eurent lieu entre le demandeur et le défendeur, mais qui ne parurent pas avoir pour le moment aucun résultat fâcheux.

Madame Evanturel, mère, eut en l'été 1860, quelques semaines après le mariage de M. et madame Rémillard, une forte attaque de choléra du pays dont elle faillit mourir, et qui eut pour résultat de l'affaiblir considérablement et physiquement. En novembre, 1860, M. Rémillard eut avec madame Evanturel une entrevue privée, dans laquelle il avoue avoir eu pour but de solliciter et d'obtenir la pratique de sa belle-mère comme avocat, ce qui lui fut refusé, et à la suite il écrit (le 19 novembre, 1860) au défendeur une lettre très-sévère, contenant des reproches très-graves et des menaces de vengeance, lettre que son habile avocat a déclaré regretter sincèrement. Cette lettre

fut communiquée par le défendeur à sa mère, avec déclaration de trois alternatives, ou de cracher à la figure du demandeur, ou de le provoquer en duel, ou de le traiter avec le plus profond mépris. Sur ce, ou à la suite de cette conversation, déclaration est faite par madame Evanturel que ceux qui maltraiteraient son fils s'en repentiraient.

Le 1er décembre, 1860, par acte devant Philippe Huot et confrère, N. P., madame Evanturel fait au défendeur une donation entrevifs de ses droits d'usufruit et de propriété dans l'emplacement ci-dessus énoncé, situé rue Saint-Louis, et ce en considération de son affection. L'intelligence et les bons rapports avaient existé dans la famille depuis le mariage de M. Rémillard, en juin, 1860, jusqu'à cette fatale lettre ; il y avait tous les dimanches soir chez madame Evanturel réunion avec souper, à laquelle prenaient part toutes ses filles et leurs maris, et assez rarement le défendeur. M. Rémillard cessa d'y prendre part dès la fin de l'année 1860, et les autres filles et gendres, dès le printemps 1861, n'y assistaient pas aussi régulièrement, et en 1862, ces réunions avaient complètement cessé. Enfin, en mai, 1861, madame Evanturel fait son testament en question en cette cause, dont le dispositif principal est qu'elle donne l'usufruit de tous ses biens au défendeur, la propriété aux enfants du défendeur, confirme et ratifie la donation ci-dessus, le tout à la charge d'une rente annuelle et viagère de £25 à chacune de ses filles, et une rente annuelle et viagère de £15 à chacune de ses trois sœurs, (de la testatrice) et la testatrice voulut et ordonna que ceux de ses légataires susdits qui contesterait son testament fussent déchus de tous leurs droits à sa succession, et décharge le défendeur de l'obligation de rendre compte de sa gestion et administration de ses biens, et nomme le défendeur son exécuteur, et à son défaut M. Jacques Orémazie, recorder de cette ville. Après ce court exposé historique, je dois en venir aux points principaux de la cause, soulevés d'un côté et combattus de l'autre avec une habileté qui fait également honneur aux avocats de la cause.

Mais avant, j'exprimerai encore une fois mon regret, savoir, que le testament en question n'ait pas été suivant moi dicté et nommé conformément à la stricte interprétation de la loi, alors nous aurions pour nous guider dans l'appréciation de l'état physique et mental de la testatrice, et des moyens de suggestion et captation, des données certaines, non équivoques, sur la mémoire, le jugement et l'entendement de la testatrice. Infailliblement si on eût suivi à la lettre (et non par équipollence) les formes prescrites, nous n'aurions pas aujourd'hui à faire une enquête sur l'état mental d'une femme infiniment respectable, et sur les faits de fraude, captation et suggestion reprochés au défendeur ; cet état d'incertitude aurait disparu comme un souffle devant l'expression légalement détaillée par la testatrice de ses dernières volontés.

A défaut de cela, il me faut dans un labyrinthe de preuves, de conjectures, de suppositions toutes plus ou moins plausibles, rechercher la vérité et adjuger suivant des circonstances incertaines parce qu'elles ne sont pas constatées légalement, et qu'elles sont plus ou moins voilées d'un masque. Au juge dans de semblables circonstances est imposée une tâche difficile, et pouvant presque conduire à l'arbitraire suivant ses appréciations de la valeur des preuves qui lui sont offertes.

Les prétentions des demandeurs résultant de la preuve en cette cause sont, que le défendeur avait un immense intérêt à obtenir la riche succession de sa mère, parce qu'il n'avait pas de ressources privées, ne faisant rien par sa profession d'avocat qu'il ne suit pas, qu'il menait un gros train de vie avec une nombreuse famille ; qu'ayant eu la gestion et administration des biens de toute sa succession, il vivait aux dépens de madame sa mère, et n'aurait pu consentir à tomber de si haut sans faire un suprême effort pour conserver tous ses avantages. Les demandeurs en concluent qu'il a dû faire des efforts inouis, quoique cachés et dissimulés, pour obtenir sur l'esprit d'une mère faible un ascen-

dant tel qu'il put l'engager à changer son premier testament qui contenait une distribution à peu près égale entre tous les enfants de la testatrice, et y substituer un autre testament par lequel lui, le défendeur, aurait la part du lion.

Les faits principaux invoqués par les demandeurs pour en venir à ces conclusions, sont : 1o la faiblesse physique et mentale de madame Evanturel et son isolement, puisque trois personnes seules étaient admises dans son intimité. Que la maladie dont elle est morte, savoir, paralysie progressive, datait dès avant 1861, et remontait à 1860, et que la faiblesse physique qui en a été la suite a dû produire le même effet sur son moral et la rendre une proie facile à la cupidité du défendeur. Que lors du testament elle était dans un grand état d'exaltation, non pas folle, mais très-faible, et était sous l'influence de l'idée qu'on voulait la faire passer pour folle. Les demandeurs tirent du fait qu'en l'été 1861 (une couple de mois après la confection du testament), le défendeur ayant requis le Dr. Landry, de Québec, de constater l'état mental de sa mère, un argument contre la bonne foi du défendeur, et invoquent ce fait comme prouvant qu'à l'époque du 18 mai, 1861, madame Evanturel était déjà très-faible d'intelligence. Ils disent que dès le mois d'avril, 1862, elle était devenue morose, parlant peu, si faible qu'elle n'aurait pu s'occuper d'affaires et ayant oublié une partie de ses dispositions testamentaires. Les demandeurs invoquent et avec force le premier testament de 1852, par lequel elle distribuait tous ses biens également entre tous ses enfants, testament qu'elle a laissé subsister jusqu'en mai, 1861, pour alors le révoquer lorsqu'elle avait, suivant eux, perdu une grande partie de son énergie et de sa volonté. Les demandeurs défient le défendeur d'expliquer la cause de ce changement dans les dispositions de ce testament ; ils prétendent qu'en 1852, elle était juste parcequ'elle était forte, et qu'en 1861, devenue faible, elle a consenti à une injustice manifeste. Ils prétendent qu'en plusieurs occasions madame Evanturel aurait regretté ce dernier testament. Que ce

changement ne s'explique que par les plaintes du défendeur contre ses sœurs et ses beaux-frères, par les dénigrements qu'il n'a cessé de faire de ses co-héritiers, en disant qu'ils voulaient ternir le nom de sa mère et la faire passer pour folle. Ils allèguent que dans une occasion le défendeur aurait dit à sa mère, en parlant de M. Suzor, "*chassez-moi cette canaille.*" Que le défendeur a bien su utiliser la malencontreuse lettre de M. Rémillard, de novembre, 1860, pour opérer sur l'esprit de madame Evanturel, et lui faire consentir quelques jours après une donation partielle, suivie en mai, 1861, du testament en question en cette cause ; que dès ce moment a commencé toute la difficulté. Ils prétendent que depuis 1863, époque à laquelle madame Evanturel est venue demeurer chez le défendeur, celui-ci a écarté ses sœurs et beaux-frères, leur a fermé la porte ainsi qu'aux étrangers, et ce dans le but d'empêcher madame Evanturel de revenir sur son testament, et qu'en autant le défendeur a eu le champ libre et a réussi dans ses desseins. Ils prétendent que le défendeur s'est servi de la main d'un de ses enfants pour faire demander à M. Casault, avocat, de venir voir sa mère, et ils en concluent manœuvres frauduleuses, dol et suggestion. Ils prétendent que le défendeur a jeté à la porte madame Lépine, amie intime de madame Evanturel, et qu'elle aurait dit qu'elle avait été forcée de faire des papiers. Enfin ils prétendent que la mère affaiblie par la maladie, au moral comme au physique, pouvait être et a dû être influencée par un fils unique au point de les déshériter pour ainsi dire.

Encore une fois, reproches graves, faits sérieux, pertinents, suffisants pour annuler le testament s'ils sont justifiés par la preuve, et s'ils ne sont expliqués aussi par la preuve.

Il ne faut pas perdre de vue, en thèse générale, dans l'appréciation des faits et des prescriptions qui sont invo-

qués en semblables matières, certains principes dont j'émettrai les suivants :

1° Que tout individu a le droit de disposer comme bon lui semble de ses biens, sans être obligé d'expliquer ses motifs, ses raisons.

2° Que tout testateur est supposé être, au moment de son testament, en possession de son intelligence à un degré suffisant pour tester d'une manière légale, en un mot, que la possession de l'intelligence est l'état normal de l'être humain, à moins que cet individu n'ait été privé de l'exercice du droit de tester par une interdiction judiciaire.

3° Que comme corollaire de la dernière proposition, il incombe à celui qui attaque un testament comme fait par une personne incapable de tester par suite de faiblesse d'esprit, de prouver cette faiblesse d'esprit, et que le légataire n'a qu'à se tenir sur la défensive.

4° Que le testament *ab irato* n'est pas par lui-même frappé de nullité, à moins qu'il ne soit le fruit du dol, de la suggestion et de la captation.

Avec ces principes que j'appliquerai à la cause, le défendeur peut répondre que l'intérêt seul que le défendeur pouvait avoir à obtenir toute la succession de sa mère au lieu de la voir partagée avec ses sœurs ne peut militer contre lui, et qu'il faut prouver son dol, ses menées, ses suggestions, sa captation. Qu'il en est de même du reproche de n'avoir pas de ressources privées pour soutenir le gros train de vie mené par lui, et pour rendre compte de la gestion et administration des biens de sa mère. Qu'il y a preuve ou au moins probabilité qu'il rendait compte à madame Évanturel à fur et à mesure qu'il collectait pour elle, ce fait étant allégué par M. Casault en son témoignage, que d'ailleurs il n'était pas tenu ni appelé en cette cause à faire la preuve de sa non comptabilité. Le défendeur repousse avec énergie l'accu-

sation d'avoir par sa fraude, ses menées, ses calomnies et jusque par ses médisances engagé sa mère à dévier de son premier testament et avoir fait celui de 1861. Ici commence la difficulté. Nul doute que jusqu'en juillet, 1860, madame Evanturel ait été en possession d'une forte intelligence, quoique non accompagnée d'éducation, et qu'elle ait eut aussi en partage, comme on l'a vu, un excellent caractère, un excellent jugement, avec une très-forte dose de fermeté. Tous les témoins, parents et étrangers, s'accordent sur ce point. En juillet, 1860, elle éprouva une forte attaque de choléra du pays qui la conduisit quasi aux portes de la mort, mais dont elle revint heureusement, et à compter de ce moment, suivant quelques témoins, elle avait éprouvée une perte de forces physiques et mentales à un degré considérable, et suivant d'autres témoins, cette perte de forces n'aurait affecté que le physique, le moral étant resté ce qu'il était avant. Le Dr. Landry a constaté ce fait en l'été 1861, un an après, deux ou trois mois après le testament, M. Paré, gendre de madame Evanturel, et madame Paré elle-même, tous intéressés dans un sens inverse, admettent franchement qu'elle a toujours eu son intelligence, qu'elle pouvait bien faire un testament, mais que depuis février, 1862, sa faiblesse physique avait augmentée jusqu'à sa mort en novembre, 1863. M. Peticlerc, qui a fait son testament en 1852 et en 1861 l'a trouvée en l'une et l'autre occasion parfaitement intelligente. Le Dr. Painchaud nous dit que cette femme avait une grande intelligence, mais qu'en septembre, 1862, elle était affaiblie, mais non sous le rapport de l'intelligence, et ce brave et savant vétéran de la profession médicale confirme ce qui a été dit plus haut sur la fermeté de la volonté de madame Evanturel. Nul doute que les forces de madame Evanturel, attaquées de cette maladie que le Dr. Landry a qualifiée de paralysie progressive, et que les autres médecins, les docteurs Painchaud et Baillargeon ont qualifiée d'épuisement, de faiblesse due à une constitution naturellement faible et à l'âge, ne purent que diminuer, mais s'en suit-il

que l'intelligence en ait été affectée à un point de ne pas laisser à la testatrice la mémoire, le jugement et l'entendement nécessaires pour tester valablement et équitablement, et au point de la rendre susceptible de devenir la proie facile des manœuvres du défendeur, je ne le crois pas ; il n'y en a pas de preuves dans cette cause, au moins à l'époque du 18 mai, 1861, date du testament, et je dirai pendant au moins dix-huit mois après la date du testament. Il n'a pas été prouvé dans la cause que cette maladie, au moins dans ses premières phases, fût de nature à affaiblir l'intelligence de la malade. Un seul témoin, madame Lépine, prétend qu'en mai, 1861, madame Evanturel n'avait plus la même force ni la même mémoire qu'avant 1860, qu'elle vivait retirée, avait un air rêveur, était peu communicative : que lors du testament, madame Evanturel avait un peu d'exaltation, mais plus de faiblesse que de folie, et qu'elle avait fait usage de ces mots, qu'il y en aurait qui seraient bien attrapés, qu'il y avait inimitiés entre ses gendres, que M. Rémillard s'était plaint du défendeur et l'avait insulté.

Je le demanderai, est-ce là de la folie. Non. Il y a probablement mécontentement par suite de la malheureuse lettre du demandeur au défendeur, elle a pu être blessée de la remarque que contenait cette lettre au sujet du droit qu'elle avait de léguer elle-même ses biens. Elle se rappelait probablement cette lettre, quoique après six mois de temps, et cela, avec le fait d'être sortie en voiture pour aller faire son testament et rencontrer trois ou quatre étrangers, a pu produire chez elle cet état d'excitation que madame Lépine croit avoir remarqué. Mais si l'on oppose à ce témoignage, ceux de MM. Casault, Huot et Petitclerc, on verra que madame Evanturel était parfaitement calme et en possession de son intelligence le 18 mai, 1861. Une madame Jackson prétend qu'en avril, 1862, elle a parlé à madame Evanturel de son testament, et que sur demande si elle avait pensé à ses sœurs, elle dit que non : et on en

conclut qu'elle avait tout oublié, et qu'elle ne savait ce qu'elle avait fait. Notons que cela est arrivé un an après le testament, et quand bien même à cette dernière époque (avril, 1862,) madame Evanturel eût perdu son intelligence au point de ne se point rappeler toutes ses dispositions, cela ne militerait pas contre son état en mai, 1861. D'ailleurs, quel besoin avait madame Jackson de faire cette question ? et quelle nécessité d'y répondre. Une réponse négative est souvent la seule convenable à donner à un questionneur importun. Un témoin, le respectable M. Charles Langevin, constate qu'en 1862, elle a refusé d'endosser un billet pour M. Paré, et ce sans avoir vu le défendeur. Ce monsieur prouve son intelligence, sa fermeté caractéristique. Il y a preuve que jusqu'en mai, 1863, madame Evanturel transigeait toutes ses affaires, payait ses serviteurs et s'occupait de sa maison.

Mais on prétend que ce n'est pas dans une seule visite que l'on peut constater le degré d'intelligence d'un individu quelconque : que le médecin le plus qualifié peut s'y tromper, et croire parfaitement sain tel individu affecté de monomanie, qui, une fois excité, se trahit par quelques actes de folie. D'accord, mais voyons ce que disent les Drs. Painchaud et Landry, tout en admettant la difficulté de saisir à première vue le degré d'intelligence d'un individu. Le Dr. Landry a dit : "J'ai constaté dans l'été de 1861 qu'elle avait toute son intelligence," et pour ce, il a dû faire toutes les questions, parcourir tous les terrains possibles, soulever tous les points probables et susceptibles de faire ressortir la faiblesse de l'intelligence de madame Evanturel. Cependant, il reste convaincu de ce qu'il a dit.

Le Dr. Painchaud constate qu'en été 1862, madame Evanturel, quoique faible, avait toute son intelligence.

S'il se fut agi d'interdire madame Evanturel, j'avoue qu'il aurait fallu constater un acte de folie ou démence, et répéter plusieurs fois les visites, et peut-être toucher la

corde particulière qui fait apparaître quasi magiquement la monomanie.

Mais pourquoi les demandeurs, qui ont prétendu que cette intelligence était perdue dès 1861, n'en ont-ils pas fait preuve ?

Pourquoi madame Rémillard admet-elle que jusqu'en 1863, sa mère avait son intelligence, quoiqu'elle fut faible de corps ?

Pourquoi les demandeurs, en ouvrant leur cause, ont-ils commencé par dire que leur mère n'était pas folle, mais seulement que son esprit était affaibli et incapable de résister aux suggestions et captations du défendeur ? Ce sera à eux d'expliquer ces contradictions, et nous venons maintenant aux faits de suggestions, captations et manœuvres frauduleuses du défendeur.

Les demandeurs prétendent que le défendeur a dû suggérer à sa mère le testament en question après avoir capté son esprit par des menées frauduleuses et mensongères dirigées contre les demandeurs. Je dis, a dû suggérer, car on n'en voit aucune preuve directe, positive : le tout se trouve au chapitre des présomptions, des probabilités tirées de son intérêt à ce faire, de quelques malheureuses difficultés de famille qui surgissent parmi celles les mieux constituées. L'origine de la difficulté remonte, suivant quelque apparence de raison, à l'époque de la lettre de M. Rémillard au défendeur, à la suite de l'entrevue du demandeur avec madame Evanturel, dans laquelle il lui avait demandé sa pratique et qu'elle lui avait péremptoirement refusée. La lettre de M. Rémillard, je dois le dire, n'est pas justifiable, et sous le rapport des menaces de vengeances personnelles elle est regrettable, et sous le rapport des reproches indirects à l'adresse de madame Evanturel, elle était très imprudente. Le défendeur a communiqué cette lettre à sa mère, comme je l'ai déjà dit, et probable-

ment qu'elle a pu provoquer en faveur du défendeur la donation du 1^{er} décembre, 1860. Mais cette donation n'est pas attaquée : entre ce jour jusqu'au 18 mai, 1861, époque de l'exécution du testament, on ne voit rien de la part du défendeur qui puisse justifier l'accusation que les demandeurs portent contre lui, d'avoir par ses actes, ses menées, et une tactique de dénigrement de ses sœurs et beaux frères, capté la bonne volonté de sa mère au détriment de ses sœurs, et induit sa mère à altérer son premier testament. Elle ne demeurait pas chez lui, mais occupait une maison peu éloignée de celle du défendeur, mais toujours distincte et séparée de celle du défendeur. Il est vrai que c'est le défendeur qui, vers le 3 ou 4 mai, 1861, informa M. le Recorder Crémazie du désir de sa mère de le voir ; mais qu'y a-t-il d'extraordinaire en cela ? M. Crémazie nous dit que dans cette entrevue madame Evanturel lui a avoué qu'elle l'avait fait demander par son fils au sujet de son testament qu'elle voulait faire ; et qu'elle le requit de prendre des notes à ce sujet. Elle lui avoua qu'elle avait des sujets de plaintes contre ses gendres. M. Crémazie, sur cela, déclara qu'il n'aimait pas agir vu sa position de Recorder, et lui demanda si elle avait des avocats, et sur sa déclaration qu'elle avait MM. Casault et Langlois, il lui dit de s'adresser à eux, et obtint d'elle la permission de leur remettre les notes qu'il venait de prendre. Du témoignage de M. Casault il résulte bien que vers le commencement de mai, 1861, le défendeur l'aurait averti que sa mère désirait le voir au sujet de son testament, mais y a-t-il en cela rien de répréhensible ? Il y a aussi le fait que M. Casault a été requis par une note écrite de la main d'un enfant de se rendre chez M. Petitclerc pour l'exécution du testament. Encore là n'y a-t-il rien pour justifier les accusations de fraudes et de captation.

La visite du Dr. Landry, en été 1861, pour constater l'état mental de sa mère, ne peut être reprochée au défendeur, qui, ayant probablement entendu dire que l'on criti-

querait le testament de sa mère, a pris cette sage précaution, et il suffit de connaître le nom du médecin pour se persuader de sa compétence sous tous les rapports, pour constater le fait de l'existence de l'intelligence de la testatrice. J'avoue qu'en thèse générale les moyens de captation et de suggestion doivent être reçus favorablement, vu la difficulté de prouver ces faits, vu surtout que le légataire qui aurait pris ces moyens, doit être supposé avoir en même temps pris ceux de cacher et de dissimuler avec habileté toutes ses manœuvres frauduleuses. Mais dans ces cas-ci, pour prouver captation et suggestion, il faut d'abord montrer que madame Evanturel fût tellement faible d'esprit, eût tellement perdu de sa volonté énergique, qu'elle pouvait facilement devenir le jouet et la victime des manœuvres du défendeur. Or, le contraire m'est apparu de la lecture souvent répétée et de l'appréciation des faits de la cause : il faudrait en second lieu que l'on prouvât contre le défendeur des démarches, des actes quelconques de nature à faire voir qu'il ait sollicité, importuné ou menacé sa mère, et ce à un point de la maîtriser, de lui faire perdre l'usage de son bon jugement, en un mot, au point de substituer sa propre volonté à la sienne. Or, on ne voit rien de semblable certainement jusqu'au moment de l'exécution du testament.

On a invoqué comme très forte contre le défendeur la circonstance mentionnée par le témoin M. Suzor, dans laquelle le défendeur dit à sa mère, en parlant de M. Suzor, *chassez moi cette canaille*. Mais, outre que ceci ne démontre qu'une querelle entre deux beaux-frères, on peut dire qu'il est admis par M. Suzor qu'il est d'un tempérament très irascible : il a donc pu dire en cette occasion quelque chose de blessant sans pouvoir s'en rappeler lors de son examen. D'ailleurs, il est témoin intéressé et comme tel aux yeux du juge, sa déposition doit être appréciée avec beaucoup de circonspection. Il y a preuve même que pendant l'enquête en cette cause sa violence l'a

porté jusqu'à montrer le poing au défendeur en pleine cour. Il est heureux pour lui qu'un geste aussi significatif n'ait pas été saisi par le juge, qui, dans ce cas, aurait eu, sans aucun doute, le pénible devoir de lui faire comprendre d'une manière pratique l'inconvenance d'une pareille conduite.

Je n'adopte pas comme nécessitant ces suggestions et cette captation, le fait de querelles entre M. Suzor, M. Rémillard et le défendeur, le fait que le défendeur avait informé M. Crémazie ou M. Casault du désir de les voir à propos de son testament: ce sont de ces choses parfaitement compatibles avec l'absence de fraude. Je dirai plus, que dans mon opinion, il n'y aurait pas suggestion et captation dans le fait qu'un légataire aurait prié un testateur de tester en sa faveur, pourvu que le testateur n'eût pas été trompé ni circonvenu, et qu'il fut en possession d'un degré d'intelligence suffisant pour pouvoir valablement tester. Le dol, la fraude, le défaut d'intelligence sont les bases de la captation et de la suggestion. Les autorités anciennes et modernes sont positives à cet égard, et avec sagesse. Autrement, il n'y aurait pas de rapports possibles entre un testateur et un légataire qu'il désirerait avantager: tout serait interprété défavorablement, et que deviendrait la liberté de tester que l'on fait si haut sonner? Elle disparaîtrait à la demande d'un enfant dénaturé qui voudrait se soustraire à une juste exhérédation sous le prétexte futile qu'un légataire ou héritier plus digne, qui aurait mérité bien mieux que lui les faveurs du testateur, aurait eu l'imprudence de faire quelque démarche, soit pour se procurer cette faveur ou pour faciliter au testateur l'occasion d'exécuter ses volontés. Mais on dit que madame Évanturel avait regretté son testament. Je ne vois rien de semblable dans la déclaration qu'elle a faite qu'elle avait été forcée de faire des papiers. Elle a pu être forcée par les circonstances, mais non par le défendeur, et elle a persisté dans ce testament qu'elle pouvait changer chaque

jour. Elle ne le change pas, elle reçoit les visites de ses filles sans empêchement tous les jours, et il lui aurait suffi d'un mot pour avoir un notaire.

Dans la présente cause, outre le fait de l'intelligence de la testatrice au moment de l'exécution de son testament, à un degré qui ne laisse dans mon esprit aucun doute sur sa capacité légale de faire cet acte civil de tester, nous avons dans le témoignage la preuve de ses motifs de changer son premier testament, de laisser la plus grande partie de ses biens au défendeur, la détermination arrêtée depuis longtemps d'avantager le défendeur bien plus que ses autres enfants, détermination qu'elle a plusieurs fois exprimée tant avant que depuis la date de son testament, elle a même dit à une de ses filles : " Vous ne serez pas riches, vous n'aurez pas grand'chose, " ou autres paroles de même portée. Je considère donc que les demandeurs ont failli dans leurs allégations de l'insuffisance de l'intelligence de madame Evanturel, dans les accusations de suggestions et de captation, accompagnées de dol et de fraude, ou au moins de rien de précis, positif, ni concluant, et surtout au moment de l'exécution du testament, en un mot les défendeurs ont failli de prouver ce qui, suivant moi, était indispensablement nécessaire, savoir : grande faiblesse d'esprit et pernicieuse influence. (1)

Quels ont été les motifs, les raisons de la testatrice pour changer son testament ? Il est peut-être difficile de les expliquer complètement. Nous devons les respecter parce que rien ne constate leur futilité ni leur fausseté. En les supposant fondés sur le désagrément qu'elle aurait éprouvé de voir ses enfants se retirer peu à peu, et comme par degrés, de chez elle, cesser leurs fréquentes visites, leur abstention de prendre part aux réunions habituelles du

(1) Trébuchet, *Jurisprudence de la Médecine*, pages 111 à 116 :—Briand et Chaudé, *Médecine Légale*, page 514 :—*English Ecclesiastical Reports*, avec précis de la célèbre cause *Greenwood vs. Greenwood* :—1 Roberts on Wills, page 40 :—*Modern Probate of Wills*, pages 105, 118, 123, 140, 144 :—2 Soefve, *Questions Notables*, ch. 60, page 146, et ch. 80, page 166 :—Merlin, *Répertoire*, vbo. *Suggestions*, page 405.

dimanche, en les supposant même fondés sur le désagrément que lui auraient causé les querelles entre ses gendres et son fils, sur leurs mauvais rapports, il n'y aurait là rien que nous pourrions sérieusement blâmer et considérer comme insuffisant pour justifier son changement de volonté. En les supposant fondés sur la colère même nous n'aurions rien à critiquer, car il est admis à l'heure qu'il est que le testament fait sous ce motif est valable en loi.

A-t-elle voulu avantager son fils seulement parce qu'il avait une nombreuse famille, que comme aîné et seul garçon il serait capable de protéger ses sœurs non-seulement par sa fortune mais par l'influence de sa position en politique. A-t-elle voulu conserver ses biens au nom Evanturel. On a vu de ces exemples et on en voit tous les jours, surtout en Angleterre, dans un but bien connu. A-t-elle vu que ses trois gendres ne sauraient conserver la part de fortune qu'elle donnerait à ses filles, vu surtout que l'un, M. Paré, aussi bien que M. Suzor, ou avaient été malheureux en affaires de commerce, ou ne lui présentaient pas les garanties qu'elle exigeait pour leur confier une partie de ses biens. A-t-elle vu dans M. Rémillard de meilleures garanties ? Ce sont là autant de secrets pour nous, et qu'il nous est inutile de vouloir approfondir. La volonté d'un testateur, sain d'esprit, mémoire et entendement, sans suggestion et captation, fruits de la fraude, seule justifie les dispositions testamentaires, *sic volo, sic jubeo* : c'est la suprême loi que nous devons respecter et exécuter dans son intégrité. Mais, après tout, peut-on dire que les demandeurs, et les autres enfants de madame Evanturel en soient absolument déshérités ? Non. La part du défendeur est meilleure sans doute, mais ne l'est pas d'une manière à blesser toute justice. La fortune de M. Evanturel pouvait être, d'après ce que je vois, d'à peu près 20 à £22,000. La moitié a été donnée par parts égales entre tous les enfants suivant le testament de M. Evanturel, père, moins cependant le legs de l'emplacement, rue Saint-Louis, fait

au défendeur seul. Le reste £10,000 est laissé au défendeur à la charge de payer à ses quatre sœurs une rente viagère de £25 chacune, et une rente de £15 à chacune des trois sœurs de la testatrice. Les sœurs du défendeur sont toutes jeunes femmes, et les dettes sont à sa charge.— Le défendeur aurait donc £145 de rente viagère à payer sur son propre usufruit de biens laissés en propriété à ses enfants.

Pour me résumer, je dirai, en deux mots, qu'obligé par le jugement de la Cour du Banc de la Reine de considérer le testament de madame Evanturel comme revêtu des formes extérieures légales, je dois, en sus, dire que la preuve faite en cette cause n'a nullement justifié les allégations de suggestions et de captation, accompagnées de faiblesse d'intelligence, contenues dans la plaidoirie des demandeurs, et qu'en autant le testament doit être maintenu comme légal, et l'action des demandeurs renvoyée avec dépens.

Jugement.—Considérant que la Cour du Banc de la Reine de Sa Majesté pour le Bas-Canada, par son jugement en date du vingt juin, mil huit cent soixante-et-cinq, renversant celui de la Cour Supérieure, en date du cinq septembre, mil huit cent soixante-et-quatre, a dit et déclaré que le testament de feu Dame Marie-Anne Bedard, en question en cette cause, en date du dix-huit mai, mil huit cent soixante-et-un, passé à Québec, par devant Mtre. Joseph Petitclerc et confrère, notaires publics, avait été dicté et nommé par la dite Marie-Anne Bedard, aux dits notaires, suivant et conformément à la loi :

Considérant que la Cour Supérieure actuelle est liée par ce jugement, et doit regarder le dit testament comme ayant été exécuté avec toutes les formalités exigées par la loi :

Considérant que les demandeurs ont failli de prouver les allégations de leurs réponses spéciales à l'exception

péremptoire en droit perpétuelle du défendeur, relatives aux faits de suggestion et captation reprochés au défendeur par les demandeurs, et aussi relatives à l'état mental de la dite feue Marie-Anne Bedard et à sa capacité de faire un tel testament, la Cour renvoie les dites réponses spéciales des demandeurs :

Considérant qu'en autant, l'action des demandeurs n'a plus de base et est non fondée, la Cour renvoie la dite action des demandeurs, avec dépens en faveur du défendeur.

JOLY, pour les demandeurs.

FOURNIER, C. R., Conseil.

LANGLOIS, J., pour le défendeur.

SUPERIOR COURT.—QUEBEC.

Before :—STUART, Justice.

No. 788. { MAGUIRE.....*Plaintiff.*
vs.
{ LINK.....*Defendant.*

Held :—1o. That an affidavit for *saisie-arrêt* before judgment in an action for money paid, laid out and expended, and lent and advanced by the plaintiff to the defendant, and at his request, is bad for not distinctly stating that the money paid, laid out and expended was so paid, &c., to the use of the defendant, and at his request.

2o. That where an affidavit for the issuing of a *saisie-arrêt*, embraces several causes of action and one of them is defectively stated, it vitiates the whole affidavit.

Jugé :—1o. Qu'un affidavit pour *saisie-arrêt* avant jugement dans une action pour argent payé et dépensé, et prêté et avancé par le demandeur au défendeur, à sa requisition, n'est pas valable s'il n'est pas distinctement allégué que l'argent payé, prêté et avancé a été ainsi payé, etc., pour l'usage du défendeur, et à sa requisition.

2o. Que lorsqu'un affidavit pour *saisie-arrêt* embrasse plusieurs causes d'action, et que l'une d'elles n'est pas suffisamment énoncée, tout l'affidavit se trouve vicié.

Judgment rendered the 9th October, 1865.

The action was commenced by a *saisie-arrêt* before judgment. The plaintiff's affidavit being worded in the following manner : " Denis Maguire, senior, of Montreal, " duly appointed agent for Bridget Maguire, the plaintiff,

" being duly sworn, doth depose and say : That George
 " Link, of Dantzic, in Russia, ship-owner, is well and truly
 " indebted to the plaintiff in a sum exceeding forty dollars,
 " to wit : in the sum of \$1200.00, for goods sold and deli-
 " vered by the said plaintiff, to the said George Link, and
 " for moneys paid, laid out and expended by the said
 " Bridget Maguire, to and for the said George Link, and
 " for money had and received by the said George Link,
 " by and through his duly authorized agent, the then
 " master of the vessel *Frederick der Grosse*, whereof the
 " said George Link was then, and still is the owner, and
 " for the amount of an account stated and settled between
 " the said Bridget Maguire and the said George Link, by
 " his said agent, to wit, the then master of the said vessel,
 " and the said George Link being then absent from the pro-
 " vince, and for commission due and of right payable by
 " the said George Link, to the said Bridget Maguire, for
 " and in respect of the management of the business and
 " concerns of the said George Link, and for advances
 " made to the master of the said vessel for necessaries and
 " for provisions and supplies found and provided by the
 " said Bridget Maguire, to the said George Link, repre-
 " sented by the master of the said vessel, as aforesaid, and
 " for the service, use and interest of the said ship, and for
 " freight due and of right payable by the said George Link
 " to the said Bridget Maguire.

" That the provisions, supplies and necessaries found and
 " provided by the said Bridget Maguire, and received on
 " board the *Frederick der Grosse*, were so furnished in the
 " interest and for the service of the said vessel, which was
 " a foreign vessel then in the port of Quebec, in the prose-
 " cution of a voyage. That this deponent is credibly in-
 " formed, &c."

Upon the above affidavit a writ of *saisie-arrêt* before
 judgment issued, and the vessel *Frederick der Grosse* was
 attached.

The writ having been returned and the amount claimed having been deposited in Court, the defendant moved for the quashing of the writ and the annulling of the seizure.

" 1° Because the affidavit upon which the writ issued contains and sets forth various causes of action and states the said defendant to be indebted in one entire sum."

" 2° Because the affidavit does not distinguish how much is due on each account."

" 3o Because one of the said alleged causes of action is 'money paid, laid out and expended,' but it is not stated that such money was paid, laid out or expended at the request of the defendant."

" 4° Because another of the said alleged causes of action is 'money had and received by the said George Link,' but it is not stated that such money was received on the account of the plaintiff or to or for the use of the plaintiff."

" 5° Because the said affidavit doth not state with reference to another ground of action therein set forth; to wit: 'The management of the said defendant's business upon which commission is charged,' that such management was at the instance and request of the defendant."

" 6° That another ground or cause of action contained in the said affidavit is: 'Freight due and of right payable by the said George Link to the said Bridget McGuire,' and the said affidavit doth not shew in any manner what the said freight or goods consisted of, or for whom the work of carrying goods, if any were carried, was done or who earned such freight, and because there is nothing to shew that any goods were carried by the plaintiff for the defendant and at his request."

“ 7^o Because the said affidavit being bad, irregular and insufficient in the above mentioned material parts, is bad for the whole, and was not, and is not, sufficient in law to warrant the issuing of any writ of *arrêt simple* thereon.”

HOLT, for defendant :—In support of his motion argued that the affidavit was insufficient and defective in several material parts. In the first place, although the affidavit sets forth several grounds or causes of action, the indebtedness is fixed and sworn to in one entire sum without specifying in what amount the defendant is indebted for each separate cause ; the affidavit is further defective in not shewing that the money alleged to have been paid, laid out and expended, and lent and advanced by the plaintiff to the defendant, was so paid, laid out and expended by the plaintiff for the use and advantage of the defendant, and at his special request. There are several authorities establishing this point : (1)

It may, therefore, be assumed as established that the affidavit is defective in part, but it had been held that where an affidavit is defectively stated in part the whole affidavit is bad. The case of *Baker vs. Wells*, 1 Dowlings, Rep. 631, is exactly in point, it being held in that case that where an affidavit to hold to bail embraces several causes of action and one of them is defectively stated, it vitiates the whole affidavit.

In the case of *Jones vs. Collins*, 6 Dowling's Rep., 533, WILLIAMS, Justice, said : “ The case of *Prior vs. Lucas*, “ establishes this rule that where the total amount sworn “ to is not mixed up with what is partly good and partly “ bad, but where distinct and separate causes of action in “ separate amounts are sworn to, the affidavit is good as to “ that amount in respect to which it is correct and the

(1) Harrison's Digest, 338, *Frichs vs. Poole*, 4 M. and R., 448 ; 9 B. and C. 543 :—1 Dowling's Rep. 333, *Vigor et al vs. Delegal* :—2 B. and Adol, 571, *Vigor et al vs. Delegal* :—Vide, 1 Ser. and Lowb. R., p. 239, *Eyre vs. Hutton* :—Ser. and Lowb. R. p. 421, *Brown vs. Garner* :—7 East, 194. *Perk vs. Severn*.

"Court will not discharge the defendant altogether for such an objection."

But in the present case the amount of each distinct and separate cause of action is not set forth, they are all joined in one entire sum, which is sworn to, and the affidavit being bad in part in not showing that the money paid was paid for the benefit of the defendant, and at his request, must be held to be bad altogether, and the writ issued in virtue of it quashed and set aside. (1)

HEARN, for plaintiff:—Contended that the cases cited by the defendant, in support of his motion, did not apply to this case, as the affidavit for *saisie-arrest* was necessary under the provision of a special statute, which only required that the amount due should be clearly set forth in the affidavit without rendering it necessary to set out the full details of the causes of action.

Judgment:—The Court having heard the parties respectively upon the rule of the fifth day of September last, obtained by the defendant upon his motion to set aside and quash the writ of attachment, *saisie-arrest simple*, in this cause issued, for the reasons in the said motion mentioned, doth declare the said rule absolute, and thereupon, doth set aside and quash the said writ of attachment with costs against the said plaintiff.

MACADAMS, for plaintiff.

HEARN, Counsel.

PEMBERTON, for defendant.

HOLT & IRVINE, Counsel.

(1) Dowling's Rep. 631, Baker vs. Wells, 318, Rink vs. Almond:—1 Cr. and M. 238, Baker vs. Wells:—3 Mee. and W. 67, Caunce vs. Rigby:—3 Dowling's Rep., 554, Raggett vs. Guy, 1 H. and W. 198:—4 Dowling's Rep., 54, Drake vs. Harding:—1, H. and W., 364.

QUEEN'S BENCH, } DISTRICT OF MONTREAL.
APPEAL SIDE. }

Before :—DUVAL, Chief-Justice, MEREDITH, DRUMMOND
and MONDELET, Justices.

BISSONNETTE, *et al.*.....*Appellants.*
and
BORNAIS.....*Respondent.*

In an action for malicious arrest and imprisonment brought against two magistrates, and also against the complainant, and the bailiff who conveyed the plaintiff to jail.

Held, in the Superior Court, Montreal:—That the complainant had acted with malice, and that the magistrates had lent themselves to his views and had issued an illegal warrant.

In appeal:—1o. That the complainant had good ground for making his affidavit before the magistrate, but had not participated in any of the subsequent proceedings; that the bailiff had in good faith executed the magistrates warrant, and that as against the complainant and bailiff, the action must be dismissed.

2o. That the magistrates had issued an illegal warrant and were liable to the plaintiff in damages, but that the sum awarded by the Court below was, under all the circumstances, excessive.

Dans une action pour arrestation et emprisonnement malicieux contre deux juges de paix, et aussi contre le plaignant, et l'huissier qui avait conduit le demandeur en prison.

Jugé, dans la Cour Supérieure, Montréal:—Que le plaignant avait agi malicieusement, et que les juges de paix s'étaient prêtés à ses vues, et avaient émané un warrant illégal.

En appel:—1o. Que le plaignant avait de bonnes raisons pour faire son affidavit devant les juges de paix, mais n'avait nullement participé dans les procédures subséquentes; que l'huissier avait agi de bonne foi en exécutant le warrant des juges de paix, et que quant au plaignant et à l'huissier, l'action devait être renvoyée.

2o. Que les juges de paix avaient émané un warrant illégal et étaient passibles de dommages envers le demandeur, mais que la somme accordée par la Cour inférieure était, sous toutes les circonstances, excessive.

Judgment rendered the 8th March, 1866.

The action was brought by the respondent, against Anaclet Bissonnette and Joseph Bissonnette, Justices of the peace, Joseph Mongeau, bailiff of the Superior Court, and Joseph Duquet, all of the parish of St. Valentin, district of Iberville, appellants, to recover \$1000 damages for an alleged malicious arrest and imprisonment of the respondent. It appeared that on the 12th June, 1860, Duquet made a complaint on oath before Anaclet Bissonnette, as Justice of the peace in the following terms:

“ Le dit Joseph Duquet déclare que vers le 15 mai
“ maintenant dernier, il a été informé que le nommé Jean-
“ Baptiste Bornais, actuellement un des membres du con-

“ seil municipal de la paroisse St. Valentin, aurait, dans le
 “ cours de juillet, 1859, ou vers ce temps-là, et même dans
 “ le cours du printemps de la dite année, 1859, conspiré
 “ félonieusement contre la vie du dit Joseph Duquet, celle
 “ de sa femme et de ses enfants, en prenant des moyens de
 “ démolir, de nuit, en un coup de main, la maison de la
 “ dite école qu’habitaient alors, et qu’habitent encore, les
 “ dits Joseph Duquet et sa femme et ses enfants, sans spé-
 “ cification du moment où il (le’dit Jean-Baptiste Bornais)
 “ exécuterait son projet; qu’il s’en suit que le déposant
 “ est dans une crainte continuelle, et surtout depuis la
 “ semaine dernière, car pendant une nuit de cette dernière
 “ semaine, le dit Joseph Duquet entendit du bruit à la
 “ porte de la cuisine et s’aperçut qu’on voulait l’enfoncer,
 “ mais s’étant levé, les malfaiteurs s’enfuirent, et le dit Jo-
 “ seph Duquet en vit plusieurs par le chassis de la chambre,
 “ qui paraissait s’éloigner de la maison, se dirigeant sur la
 “ terre de monsieur Héneault, près de la ligne de Tous-
 “ saint Martin.”

On this, a warrant was issued by Anaclet Bissonnette
 against the respondent, who was brought before the two
 Bissonnettes as Justices of the peace, who, after hearing
 evidence, issued a warrant to Mongeau, a bailiff, to commit
 the respondent to the Montreal jail, there to be detained ac-
 cording to law. The respondent was liberated from jail
 on a writ of *habeas corpus*, and instituted the action. The
 defendants severed in their defence, the magistrates plead-
 ing a general denegation; Duquet, that he acted without
 malice, and that the allegations of the complaint were true,
 but that he had nothing to do with any subsequent proceed-
 ings adopted by the co-defendants, and was not respon-
 sible for them. Mongeau pleaded that he acted in good
 faith, in obedience to the warrant of the magistrates, and
 could not be held liable in damages.

MONK, Justice:—Held that malice was proved as against
 Duquet, and that the magistrates had lent themselves to

his views, and sent the plaintiff to jail without legal authority or reasonable grounds.

Judgment.—Superior Court, Montreal, 26th June, 1865 :

“ La Cour, etc.—Considérant que le demandeur a fait “ preuve des allégations essentielles contenues en sa déclaration, a condamné et condamne les défendeurs solidairement à payer au demandeur la somme de £100, du cours “ actuel de cette province, de dommages pour les faits “ énoncés en la dite déclaration, avec intérêt sur icelle à “ compter de ce jour, et les dépens.”

In appeal.—DUVAL, Chief-Justice:—Could see no reason whatever for joining the bailiff in an action like this. He had executed the warrant of the magistrates taking it for granted it was a legal warrant. As to Duquet he had good ground for believing his house would be attacked; there was a strong antipathy against him, he made an affidavit and prayed for justice, but took no further action in the matter. The warrant of the magistrates was illegal, and one of them had evidently taken sides with one of the parties, and should not have interfered as a magistrate.

The two magistrates had signed the warrant, however, and must be held responsible, but the damages awarded in the Court below were held by this Court to be excessive, and would, therefore, be reduced.

Judgment in appeal:— “ Considérant que la preuve offerte par l'intimé ne justifie pas la condamnation aux dommages et intérêts prononcés par la dite Cour, contre Joseph Mongeau et Joseph Duquet, deux des défendeurs en la dite Cour, appelants devant cette Cour, et que les dommages et intérêts accordés par le même jugement contre Anacleet Bissonnette et Joseph Bissonnette, les deux autres défendeurs, sont excessifs, et qu'il y a erreur dans le dit jugement, cette Cour infirme, etc., et déboute le demandeur de son action contre les dits Joseph Mongeau et

Joseph Duquet, avec dépens de la Cour Supérieure, et condamne les dits Anaclet Bissonnette et Joseph Bissonnette à payer au demandeur £25, etc." Costs of appeal in favor of the four appellants.

LEBLANC, CASSIDY & LEBLANC, for appellants.

MOREAU, OUIMETTE & CHAPLEAU, for respondent.

CIRCUIT COURT.—MONTREAL.

Before :—BADGLEY, Justice.

No. 5314. { DANSEURAU.....Plaintiff.
vs.
GIRARD.....Defendant.

Held :—That a *gardien d'office* has no action for his allowance and disbursements against the *saisi*, there being no contract express or implied between them.

Jugé :—Qu'un *gardien d'office* n'a pas d'action pour son salaire et ses déboursés contre le *saisi*, en autant qu'il n'y a pas entre eux contrat exprès ou convention tacite.

Judgment rendered the 30th April, 1866.

This action was brought to recover \$87.01, for *gardien's* allowance and expences in taking care of and feeding certain horses seized in a cause formerly pending in the Superior Court, Montreal, in a suit of Fanteux against the present defendant, in which the now plaintiff was named *gardien d'office*. The defendant pleaded: 1° That the plaintiff had not rendered any services to him as *gardien*, and was never employed by the defendant, and had no action against him: 2° Compensation.

BADGLEY, Justice :—Held, that no action lay against the defendant, at the suit of the plaintiff, inasmuch as there was no contract express or implied between them.

Action dismissed.

ARCHAMBAULT, for plaintiff.

DORION & DORION, for defendant.

COUR SUPERIEURE.—QUEBEC.

EN REVISION.

Présents :—BADGLEY, GAUTHIER et TASCHEREAU, Juges.

No. 1980. { COTÉ.....Demandeur.
 vs.
 { DE GASPÉ.....Défendeur.

Jugé :—1o. Qu'on ne peut, par voie d'action, demander la rectification d'un registre en y retranchant des mots constatant des faits accessoires, qui ne touchent en rien au caractère de l'acte, ni à l'état civil des personnes.

2o. Que la prescription de six mois ne peut être invoquée par un officier public qui, quoique dans l'exercice de ses devoirs, les outrepassé, et se permet, dans un but malicieux, des choses non nécessaires à l'accomplissement de ses fonctions ; et qu'alors le manque de bonne foi prive tel officier des droits et privilèges accordés par la loi aux officiers publics, agissant comme tels.

3o. Que, dans l'espèce, le demandeur avait droit à des dommages, et qu'un plaidoyer de *non sum informatus* ne serait pas reçu de la part du défendeur, parcequ'il devait connaître les limites de ses obligations, et savoir qu'elles ne s'étendaient pas à écrire dans les registres des mots injurieux à l'adresse d'aucune partie.

Held :—1o. That the correction of a register by striking out words stating accessory facts, that do not in any way affect the character of the *acte*, or the civil status of persons, cannot be demanded by action.

2o. That the prescription of six months cannot be invoked by a public officer who, although in the exercise of his duties, goes beyond them, and assumes, maliciously, to make entries unnecessary in the accomplishment of his functions ; and that in such case the absence of good faith deprives such officer of the rights and privileges granted by law to public officers, acting as such.

3o. That, in the case submitted, the plaintiff had a right to damages, and that a plea of *non sum informatus* would not be permitted on behalf of the defendant, inasmuch as he ought to have known the extent of his obligations, and that they did not extend to enter in registers injurious words in relation to any person.

Jugement rendu le 1er Juin, 1866.

Par sa déclaration le demandeur alléguait :

1° Que le défendeur était curé de la paroisse de St. Apollinaire, et que, comme tel, il était chargé de la rédaction des registres d'état civil, qu'il ne pouvait rien y insérer qui ne fut point essentiel à l'acte, soit sous le rapport des faits, soit sous le rapport des mots, et encore moins se servir de sa position d'officier public pour insérer dans les registres des mots injurieux pour aucune personne, et ce, dans le but de satisfaire sa haine.

2° Que le défendeur, lors du mariage de la fille mineure du demandeur, avait écrit de sa propre main dans les

registres tenus par lui, " qu'il avait marié Sara Côté, fille du demandeur, *malgré l'opposition brutale de son père.*"

3° Que ces mots comportaient une injure grave contre le caractère du demandeur, injure d'autant plus grave qu'elle était permanente.

Le demandeur concluait à ce que le défendeur fut condamné à rayer et biffer des registres les mots injurieux dont il se plaignait, et que le jugement ordonnant cela fut enregistré dans les dits registres. Il concluait, de plus, à des dommages au montant de £200.

Le défendeur, admettant les faits, répondit par une défense au fonds en droit dans laquelle il alléguait :

1° Que d'après les lois en force en cette province il n'existait aucune action pour faire réformer les registres de l'état civil, tel que demandé par l'action du demandeur.

2° Qu'en loi il n'était pas vrai de dire qu'il ne doit être inséré dans les registres que ce qui concerne la naissance, le mariage et le décès des individus, et que rien ne défend d'y insérer ce qui n'appartient pas essentiellement à ces faits.

3° Il invoquait le bénéfice de l'avis d'un mois qui, disait-il, aurait dû lui être donné, puisqu'il avait agi comme officier public.

4° Il invoquait la prescription de six mois contre l'action du demandeur.

5° Il prétendait que, d'après la loi du pays, les mots ne pouvaient être biffés, tel que demandé, et qu'en admettant qu'il y eut quelque chose d'illégal, il ne pouvait y être remédié que par une mention en marge et non par la radiation d'aucune partie de l'acte.

La Cour Supérieure par son jugement du 9 avril, 1866, accorda des dommages au montant de £25, mais refusa de

faire biffer les registres, et même d'y faire entrer le jugement en marge.

Ce jugement fut soumis à la Cour de révision sur inscription du défendeur.

Bossé, junior, pour le défendeur :— Le demandeur conclut : 1° A ce que les mots dont il se plaint soient rayés et biffés du registre : 2° A ce que des dommages au montant de £200 lui soient accordés. A la première de ces prétentions, le défendeur répond : Que l'action en réformation de registre n'existe pas en Canada. En effet elle n'existait pas en France lors de la création du Conseil Supérieur, ou du moins si elle y était quelquefois admise, en vertu de la déclaration de 1736, art. 30, (non en force dans ce pays,) ce n'était que pour des erreurs et des omissions qui pouvaient toucher aux questions d'Etat. Cette coutume était tellement incertaine et mal établie, qu'il fallut faire à ce sujet la déclaration du 12 mai, 1782, et la loi du 20 septembre, 1792. Cette législation, subséquente à la conquête, ne pouvait aucunement être invoquée, et eut-elle été notre loi, elle aurait été abolie par la 85e Geo. III, cap. 4, sec. 11 et 13. (1) D'ailleurs, le prêtre était dans l'exécution de son devoir, il devait mentionner l'opposition du père et le jugement intervenu sur icelle. (2) S'il y avait mal dans la qualification que le curé fit de l'opposition c'était par un writ de *mandamus* que le demandeur eut dû se plaindre, c'est là la procédure adoptée dans *ex parte* Thibault, C. S., No. 1839 de 1840. Les conclusions du demandeur devaient être rejetées car il ne pouvait tout au plus obtenir que mention fut faite en marge du jugement à intervenir, et ce n'était pas ce qu'il demandait. (3)

(1) Panet vs. Signay, C. S., Québec, No. 1245, de 1823 :—Ordonnance de 1667 :—Projet du Code Civil, p. 162, Coin-Delisle et Royer :—Actes de l'Etat civil, p. 16.

(2) Ordonnance de 1667 :—Stat. Ref., B. C. ch. 20, sec. 6.

(3) Déclaration de 1736, art. 30 :—Merlin, Rept. vbo: Acte de l'Etat Civil :—35 Geo. III, cap. 4, sec. 13 :—4 Favard de Langlade, vbo. Rectification d'acte de l'Etat Civil, p. 759 :—Marcadé, sur l'art. 99 :—Coin-Delisle et Royer, sur l'art. 99 :—Lébirre et Carterets, sur l'art. 100, C. N., Nos. 3 et 4, p. 54 :—1 Loaré, Esprit des Loix, p. 165, cap. 6, No. 1.

De plus, l'acte une fois écrit ne peut plus être changé parce qu'il appartient aux parties, au public, à la société, et il n'est plus permis d'y toucher. Quant à la question de dommages, la Cour Inférieure a prétendu que les officiers publics n'avaient pas le privilège du plaideoyer *non sum informatus*, le défendeur soumet qu'il y a là erreur, et la question a été jugée en ce sens dans la cause de Panet vs. Signay. Comme dernière raison le défendeur se fonde pour demander le renvoi de l'action sur la prescription de six mois, établie en faveur des officiers publics par le Stat. Ref., B. C., ch. 100, sec. 8, ce statut étant la reproduction du statut anglais il faut suivre pour son application la jurisprudence anglaise, qui étend sa protection à tous ceux qui ayant agi contrairement à la loi, et ayant commis un acte illégal et punissable, ont cependant cru qu'ils avaient droit de le faire, quand même, disent plusieurs auteurs, ils n'auraient eu aucune cause probable de soupçon. (1)

BADGLEY, Juge:—La mariée était mineure, le curé avait cependant droit de célébrer le mariage en vertu du jugement rendu sur l'opposition que son père avait faite devant le conseil de famille, et en célébrant ce mariage il n'a fait que son devoir. Mais s'il devait faire mention de l'opposition, ce n'était pas à lui à la qualifier, et en ajoutant le mot *brutal*, il a certainement commis une faute qui a causé du dommage au demandeur, ces mots étant pour lui une injure grave. Le curé est tenu de faire apparaître au registre que toutes les formalités nécessaires ont été observées, ainsi que ce que les parties lui disent d'essentiel à l'acte, mais ce n'est pas à lui à qualifier cette déclaration des parties, et dans le cas actuel ces mots n'étaient certainement pas nécessaires, mais au contraire ils n'entraient pas dans les formalités requises par la loi, ni dans la déclaration que les parties devaient lui faire. La difficulté dans cette cause est de satisfaire la juste réclamation du demandeur, car il est évident que les registres ne peuvent être biffés. Si la

(1) *Wedge vs. Barclay*, 6 Addison et Ellis, 663 :—*W. W. and D.* p. 271 :—*Jones & Williams*, 5 D. and R., p. 54 :—3 B. and C., p. 762 :—1 Car & Payne, 459, 669 :—3 Granger & Scott, p. 714 :—3 Adolphus & Ellis, p. 286 :—2 Chitty's Reports, 459 :—4 Douglas, p. 275.

question se présentait devant moi pour la première fois, je n'hésiterais pas un seul instant et j'ordonnerais d'entrer le jugement rendu en cette cause dans les registres, en marge ; mais une jurisprudence contraire est établie, et cette question a déjà été décidée dans la cause citée par le défendeur, de Panet vs. Signay, et cette jurisprudence, une fois établie, nous devons la suivre ; nous sommes donc d'accord à confirmer le jugement rendu en première instance. Quant à la question de dommages, je dois déclarer que, pour ma part, si j'eusse été le juge à qui cette cause a été soumise, d'abord, je n'aurais pas accordé des dommages aussi considérables, parce que le principal but de l'action était de rétablir la réputation du demandeur, compromise par le fait de cette entrée dans les registres des mots *opposition brutale*. J'aurais donc été d'avis d'accorder \$20 de dommages avec les frais d'une cause de première classe, qui sont assez considérables, mais puisque mes deux confrères sont d'un avis contraire, je ne crois pas à propos d'enregistrer mon dissentiment sur cette question de dommages. Et le jugement rendu le 9 avril, 1866, par Mons. le Juge, TASCHEREAU, est confirmé dans toutes ses parties.

Ce jugement est dans les termes suivants :

La Cour, etc.—“ Considérant que le demandeur a prouvé d'une manière légale les allégations principales de sa déclaration en cette cause, et notamment que, sans raisons ou motifs apparents, le défendeur en constatant le 11 avril, 1864, dans les registres des mariages, sépultures et naissances, que, comme curé de la paroisse de St. Apollinaire, il était obligé de tenir, la célébration de mariage de Sara Côté, fille du demandeur, avec Pierre Mâsse, a entré et écrit de sa propre main les mots injurieux ci-après énoncés, savoir : “ Malgré l'opposition brutale d'Amable Côté, père “ et tuteur de Sara Côté,” comme faisant partie du certificat de mariage des dits Pierre Mâsse et Sara Côté :

“ Considérant que rien ne justifiait ni n'autorisait le

défendeur d'énoncer, dans un registre public, un fait de nature à blesser les sentiments et à porter atteinte au caractère et à la réputation du demandeur, et que l'énonciation de ces mots, *malgré l'opposition brutale*, était sans nécessité aucune :

“ Considérant que le défendeur, comme officier public, ne pouvait être de bonne foi dans l'exécution de ses devoirs en insérant les mots injurieux susdits, et que, comme tel, il ne peut avoir droit au privilège et droit conféré aux officiers publics agissant de bonne foi dans l'exécution de leur devoir :

“ Considérant qu'en autant le défendeur n'a pas droit à la prescription de six mois par lui plaidée et invoquée en cette cause :

“ Considérant que le demandeur ne peut, au moyen d'une action ou procédure de la nature de celle par lui prise en cette cause, et sans avoir mis en cause toutes les parties intéressées, demander que les mots susdits soient biffés des dits registres, et que la Cour ne peut entretenir son action à cet égard :

“ La Cour déclare qu'il n'y a pas lieu, au moins quant à présent, d'altérer, changer et biffer aucune partie de la dite entrée au dit registre. En conséquence maintient, mais sans frais, le septième chef de la défense au fonds en droit du défendeur, et renvoie les autres chefs de la dite défense au fonds en droit du défendeur, avec dépens. Et vu les faits prouvés dans la cause, condamne le défendeur à payer au demandeur la somme de vingt-cinq louis courant, avec intérêt sur icelle à compter de ce neuf avril, mil huit cent soixante-et-six, et les dépens d'une action de première classe de cette Cour, comme partie des dits dommages.

FOURNIER & GLEASON, pour le demandeur.

BOSSÉ & BOSSÉ, pour le défendeur.

QUEEN'S BENCH, } DISTRICT OF MONTREAL.
 APPEAL SIDE.

Before :—DUVAL, Chief-Justice, AYLWIN, MEREDITH,
 DRUMMOND and MONDELET, Justices.

LENOIR DIT ROLLAND.....*Appellant.*
 and
 JODOIN.....*Respondent.*

Held, in the Superior Court :—In an action in damages for injury to the feelings and character of the plaintiff by words addressed to him, in the street, by the defendant, alleged in the declaration to be as follows: "Rolland, arrête donc. Quand me payes-tu? Paye donc tes dettes avant de faire le monsieur, gre-din que tu es," the proof being that the words used by the defendant, speaking to the plaintiff, were, "paye tes dettes, paye tes dettes," that the action was not sustained by proof, and was of too trivial a nature to warrant a judgment in damages.

In appeal :—1o. That the essential allegations of the declaration were proved.

2o. That the expressions must have wounded the sensibility of the plaintiff, and therefore, gave him a right of action.

3o. That a receipt signed by the parties for notes received as collateral security for the plaintiff's debt, and dated five months before the injury complained of, and produced by the defendant at *enquête*, as well as a receipt to the defendant, in full, given subsequently to the action, should have been rejected from the record.

Jugé, dans la Cour Supérieure — Dans une action en dommages pour injure aux sentiments et au caractère du demandeur, par paroles à lui adressées, dans la rue, par le défendeur, alléguées dans la déclaration être comme suit: "Rolland, arrête donc? Quand me payes-tu? Paye donc tes dettes avant de faire le monsieur, gredin que tu es," la preuve étant que les mots dont s'était servi le défendeur, étaient, "paye tes dettes, paye tes dettes," que l'action n'était pas soutenue par la preuve, et était trop triviale pour soutenir un jugement en dommages.

En appel :—1o. Que les allégations essentielles de la déclaration étaient prouvées.

2o. Que les expressions devaient avoir blessé les sentiments du demandeur, et partant, lui donnaient droit d'action.

3o. Qu'un reçu signé par les parties pour billets reçus comme cautionnement collatéral pour la dette du demandeur, et daté cinq mois avant l'injure en question, et produit par le défendeur à l'enquête, aussi bien qu'un reçu en plein au défendeur, donné subsequmment à l'action, eussent dû être rejetés du record.

Judgment rendered the 8th March, 1866.

SMITH, Justice :—This action is brought by the plaintiff, Rolland, claiming £2000 damages for certain words used towards him by the defendant, in the street, which are set out in the declaration as follows: "Rolland, arrête donc? Quand me payes-tu? Paye donc tes dettes avant de faire le monsieur, gredin que tu es."

The plea amounts to a general denegation. The proof

as stated by the only witness, Peltier, who speaks to the words used, is that, in passing in St. Gabriel street, he saw the parties, and that the defendant, turning towards the plaintiff, called out in a pretty loud tone, *criant assez haut, en souriant, paye tes dettes, paye tes dettes*. This is all the direct evidence of what passed on the occasion in question. It would appear that the parties, who are both men of respectability and wealth, had had large dealings together, and that a certain amount was due by the defendant to the plaintiff as the balance of interest on certain notes, and also that, on several occasions, a good deal had been said by the one to the other previously, which was not very complimentary or creditable to either of them. Be that as it may, the plaintiff did not appear to have paid much attention to the words complained of, until certain kind friends told him he had been grossly insulted, and thence the action. As to damages, none have been proved, and I think it is to be regretted that the action should have been brought for so trivial a matter, and I do not think that any damages can be given.

Judgment.—“ La Cour, après avoir entendu les parties par leurs avocats au mérite de cette cause, et sur la motion du demandeur, du vingt-trois mai courant, tendant au rejet de l'exhibit coté “ Z ” produit à l'enquête par le défendeur, le vingt-un mai courant, avoir examiné la procédure et le témoignage, et avoir sur le tout délibéré, sans égard à la dite motion : Considérant que le demandeur a failli complètement de prouver les allégations de sa dite action, a débouté et déboute cette action avec dépens.”

It was from this judgment that an appeal was instituted.

DRUMMOND, Justice:—Stated the nature of the action, and that in his opinion the Superior Court had dealt with it as it should have done. The words *paye tes dettes*, even if they gave a right of action, could not warrant an action for such an amount as was sued for. The injury, if any,

must have been trifling and it appeared to him that the plaintiff had brought the action when urged by officious friends, and when he found the balance of the account against him.

MONDELET, Justice:—Held the words sufficiently proved and as giving a right of action. The words were uttered in a public street, and the plaintiff had a right to complain. No one can be allowed to injure wantonly the feelings of others, and some damages ought to be given.

Judgment in appeal:—"Considérant que l'appelant, demandeur en Cour de première instance, a fait preuve des allégations essentielles de sa déclaration, et nommément que, sans cause, raison ou justification, l'intimé, défendeur en Cour de première instance, l'a injurié en pleine rue, suivant qu'allégué en la dite déclaration, en se servant à son égard des expressions qui ont dû blesser sa sensibilité, et dont le dit appelant avait droit de se plaindre en justice, comme il l'a fait :

"Considérant, par conséquent, qu'il y a erreur dans le jugement de la Cour Supérieure, lequel a débouté l'action du dit appelant et n'accordant pas la motion de l'appelant demandant que l'exhibit de l'intimé marqué Z, (1) produit à l'enquête, fut rejeté du dossier, casse, annule et met au néant le dit jugement, et procédant à rendre le jugement que la dite Cour Supérieure aurait dû rendre, faisant droit d'abord sur la dite motion, accorde icelle, et ordonne que le dit exhibit marqué Z, produit à l'enquête par le défendeur, soit, et il est, rejeté du dossier, et adjugeant au mérite, cette Cour, pour les causes énoncées dans la déclaration, condamne le dit intimé à payer au dit appelant vingt livres cours actuel, avec les dépens de la

(1) This was a receipt of the 12 March, 1863, signed by the parties, for 4 notes, amounting in all to \$1257.74, as collateral security to the plaintiff, for respondent's note of \$1200. A receipt of the 22nd December, 1863, for this note and for \$64.92, being in full for the amount due on settlement to the last mentioned date.

Cour Supérieure, dans une cause de cette classe, et le condamne en outre à payer les dépens sur le présent appel.

L'Honorable Juge DRUMMOND, *dissentiente*.

ARCHAMBAULT, for appellant.

LEBLANC & CASSIDY, for respondent.

COUR SUPERIEURE.—QUEBEC.

EN REVISION.

Présents :—BADGLEY, STUART et TASCHEREAU, Juges.

No. 214.	{	BADEAU.....	<i>Demandeur.</i>
			vs.
		GUAY.....	<i>Défendeur.</i>
			et
	{	BADEAU.....	<i>Opposant.</i>

Jugé, en Cour Supérieure :—Que l'acte produit dans la cause ne devait pas être considéré comme un acte translatif des propriétés immobilières y désignées, et que, par conséquent, l'opposition devait être maintenue.

En révision :—Que l'acte étant expliqué par les circonstances sous lesquelles il avait été fait, ainsi que par la jouissance qu'il accordait aux parties, on devait le considérer comme translatif de propriété, et renvoyer l'opposition.

Held, in the Superior Court :—That the deed produced in the cause was not to be considered a deed conveying the property of the immovables therein described, and that, consequently, the opposition must be maintained.

In review :—That the deed explained by the circumstances under which it had been made, as well as by the possession it gave to the parties, must be considered as conveying a right of property, and the opposition dismissed.

Jugement rendu le 3 mai, 1866.

Le demandeur ayant poursuivi le défendeur en dommages, celui-ci réussit à faire débouter l'action avec dépens. Et, en exécution de ce jugement, le défendeur fit saisir sur le demandeur un certain immeuble.

Le demandeur s'opposa au décret, et invoqua, comme moyen principal d'opposition, qu'il n'était pas propriétaire de l'immeuble, mais simplement locataire, fondant cette prétention sur un acte dans lequel il était dit : " que le défendeur vendit, céda, quitta, délaissa et abandonna à l'opposant une petite maison, située sur un certain terrain, (le terrain saisi en cette cause) pour le prix et somme de £5, et que la dite vente fut faite, en outre, pour le prix et

“somme de \$5 par année, pour la rente du terrain tant que la dite maison resterait dessus, et qu'il fut expressément convenu que le dit opposant serait libre de vendre, échanger et enlever la dite maison quand bon lui semblerait, et que la rente serait de ce jour éteinte.”

La question était donc de savoir quelle interprétation il fallait donner à cet acte, si cet acte avait transféré ou non le domaine utile du terrain susdit, c'est ce que prétendait le défendeur.

Les parties entendues sur le mérite de cette opposition afin d'annuler, la Cour Supérieure rendit le jugement suivant :

The Court, &c.—“Considering that the lot of ground seized in the present cause, as belonging to the plaintiff, is, in truth, the property of the defendant himself: Considering that the plaintiff is merely proprietor of the house, which he bought from the defendant for a sum of five pounds; that the said defendant can only seize and sell the said house, doth maintain the opposition *afin d'annuler*, and doth annul and set aside the seizure of the said immoveable property in this cause made.”

Le défendeur inscrivit la cause en révision pour faire infirmer ce jugement.

CASAUET, pour le défendeur:—L'acte en question a transféré à l'opposant le domaine utile du terrain. En vertu de ce titre, il l'a possédé pendant 10 ans, et c'est à tort qu'il cherche à lui donner le caractère d'un simple bail à loyer, car cet acte est ou un bail emphytéotique, ou une vente d'usufruit, ou enfin un bail à vie; mais il est tout à fait indifférent de constater lequel de ces contrats civils il est, puisqu'ils ont tous trois l'effet de transférer le domaine utile. Le demandeur a le droit de posséder le terrain tant que la maison restera dessus; il peut le posséder toute sa vie, et dans ce cas, c'est un contrat d'usu-

fruit ou un bail à vie, mais s'il le préfère, il peut déguerpir, et, en vertu de l'acte, la rente qu'il doit payer se trouvera éteinte par ce seul déguerpiement; dans ce dernier cas, le contrat a le caractère d'un bail emphytéotique. Les termes mêmes du contrat prouvent que l'intention des parties n'était pas de faire un simple bail à loyer. Pourquoi, en effet, si telle avait été leur intention, auraient-elles dit "que la vente fut faite en outre pour le prix et somme de "cinq piastres par année pour la *rente* du terrain." Au lieu de se servir du mot *rente* elles se seraient servi du mot *loyer*, expression plus connue et plus en usage pour exprimer le prix que le locataire paie pour l'usage de la propriété louée. (1)

La Cour de révision infirma le jugement rendu par la Cour Supérieure et y substitua le suivant :

The Court, &c.—"Considering that at the time of the seizure and taking in execution of the lot of land and premises in this cause seized, the said lot of land and premises, were in the proprietary right of the plaintiff, and opposant, as proprietor thereof, and by law subject to and liable to be taken in execution under and by virtue of the judgment in this cause rendered in favor of the defendant, against the said plaintiff and opposant; and considering, therefore, that in the said judgment rendered upon the said opposition of the said plaintiff and opposant, there is error, the Court, proceeding to render such judgment as ought to have been rendered, doth for the causes aforesaid dismiss and reject the said opposition of the said plaintiff and opposant, &c."

Dissentiente, STUART, Justice.

MIVILLE DECHENE, pour le demandeur et opposant.

CASAUULT, LANGLOIS & ANGERS, pour le défendeur.

(1) Merlin, Rept., vbo. Usufruit, sec. 1, No. 3, pp. 362, 368 :—Loyseau, Déguepiement, liv. 1, ch. 6, No. 8 :—Despeisses, du Louage, sec. 5, p. 125 :—Guyot, Rept., vbo. Emphytéose, p. 680 :—Nouveau Denisart, vbo. Emphytéose, pp. 638, 639 :—Pothier, Louage, No. 4, Bail à rente, Nos. 1, 2 :—Actes de Notoriétés, Denisart, pp. 47, 48.

COUR SUPERIEURE.—MONTREAL.

Présent :—SMITH, Juge.

No. 2557.	{	LACOSTE.....	<i>Demandeur.</i>
		vs.	
		JODOIN.....	<i>Défendeur.</i>
		et	
	{	QUINTAL.....	<i>Opposant.</i>

Jugé :—Que sur distribution des deniers provenant du décret d'immeubles, le cessionnaire d'un créancier porté au certificat des hypothèques, a droit à ses frais d'opposition, si son transport n'a pas été enregistré. (1)

Held :—That in the distribution arising from the sale of lands under execution, the assignee of a creditor, named in the registrar's certificate, is entitled to his costs of opposition, if the transfer has not been registered.

Jugement rendu le 31 mars, 1866.

Dans cette cause, le shérif avait rapporté une somme de deniers provenant de la vente d'immeubles saisis sur le défendeur, avec le certificat du registrateur du comté, contenant la mention de deux obligations consenties par le défendeur à Zoé Lafranchise, veuve de feu Henri Favreau.

L'opposant, Quintal, qui avait obtenu de cette dernière un transport de ce qui était dû sur ces deux obligations, produisit une opposition afin de conserver, concluant à être colloqué utilement, savoir : pour la somme de \$500 sur la première obligation, avec intérêt au taux de 7½ par cent, à compter du 27 janvier, 1865, formant \$36.91, et pour \$100, montant de la seconde obligation, avec intérêt du 1er mars, 1865, formant \$5.90, et les dépens de son opposition.

Dans le rapport de collocation préparé par le protonotaire, Quintal fut colloqué utilement pour la somme de \$600, sans intérêt sur la première obligation ; mais il ne lui fut pas accordé de frais de procureur sur cette opposition, conformément à la section 6 du ch. 39 de l'acte des 27 et 28 Vict., qui est conçue dans les termes suivants : " Il ne

(1) C'est la première fois que la question est soumise à la Cour Supérieure, dans le district de Montréal.

“ sera pas accordé de frais d'opposition à aucun opposant
 “ à la distribution de deniers prélevés par la vente d'im-
 “ meubles par le shérif, ou de deniers déposés en Cour,
 “ dans tous cas de ratification de titre ou de licitation
 “ forcée, lorsque l'hypothèque de l'opposant est portée au
 “ certificat du registrateur.” La section 22 du chapitre 36
 des Statuts Refondus pour le Bas-Canada, étendue aux
 ventes par le shérif par la section 26, sous-sec. 4, porte
 que: “ La collocation en faveur d'une partie, qui ne sera
 “ pas opposante, lui appartiendra, et à ses représentants
 “ légaux ou ayant cause, et le montant en restera entre les
 “ mains du protonotaire jusqu'à ce qu'elle ou qu'ils en
 “ fassent la demande, et en donne une quittance valable.”

Quintal contesta le rapport de distribution en autant:
 1° Qu'on ne lui accordait pas les intérêts qu'il réclamait;
 2° Qu'on ne lui accordait pas les frais de son opposition,
 auxquels il disait avoir droit, vu qu'il n'était pas porté
 nominalemeut comme créancier dans le certificat du regis-
 trateur, et qu'il ne pouvait faire valoir son transport que
 par opposition.

La question des intérêts paraît avoir été abandonnée
 lors de la plaidoirie orale, mais sur la question des dépens,
 l'Honorable Juge SMITH, en rendant jugement, considé-
 rant que le shérif ne peut être constitué juge du droit des
 ayants cause à toucher les deniers, et qu'il a droit d'avoir
 l'ordre du tribunal à cet égard, a cru que, dans ce cas, il ne
 serait que juste d'accorder les dépens; la contestation a
 donc été maintenue, sans autre motifé que celui qui suit:

La Cour, après avoir entendu le dit Joseph N. A. Ar-
 chambault, créancier colloqué, et le dit Isaïe A. Quintal,
 par leurs avocats respectifs, au mérite, sur la contestation
 du rapport de distribution fait et produit en cette cause,
 avoir examiné le dit rapport et la procédure, et avoir déli-
 béré: Considérant que le dit opposant, Isaïe A. Quintal,
 a droit à ses frais d'opposition, a maintenu et maintient la
 dite contestation avec dépens, et ordonne que le susdit

rapport de distribution soit amendé et réformé en conséquence.

GAUTHIER, pour Quintal.

CARTIER, POMINVILLE & BERTHELOT, pour Archambault.

COUR SUPERIEURE.—MONTREAL.

EN REVISION.

Présents:—SMITH, BADGLEY et BERTHELOT, Juges.

LALONDE.....*Demandeur.*

vs.

LALONDE.....*Défendeur.*

et

LALONDE.....*Opposant.*

<p>Jugé:—Qu'un créancier par jugement a droit d'exercer simultanément tous les modes de saisie et d'exécution que la loi accorde, pour contraindre le paiement de ce qui lui est dû.</p>	<p>Held:—That a judgment creditor may simultaneously exercise every mode of seizure and of execution which the law permits, to enforce payment of what is due him.</p>
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Jugement rendu le 31 mai, 1866.

Le 27 d'avril, 1865, le demandeur fit émaner de la Cour de Circuit, du comté de Vaudreuil, un bref d'exécution contre les immeubles du défendeur, pour satisfaire au jugement rendu le 25 février, 1854, en faveur du demandeur. Trois lots de terre furent saisis en conséquence, et le 6 d'octobre, 1865, onze jours avant celui fixé pour la vente, le défendeur obtint un ordre du Juge BADGLEY, lui permettant de produire une opposition afin d'annuler, fondée sur le fait qu'avant l'émanation de l'exécution contre les immeubles du défendeur, savoir: le 27 de juillet, 1864, le demandeur avait pratiqué une saisie-arrêt entre les mains d'Ignace Dumouchel et de dame M. T. Antoinette Fournier, son épouse, qui, ayant fait défaut, avaient été condamnés personnellement à payer au demandeur le montant du jugement que ce dernier avait obtenu contre le défendeur.

Le défendeur, dans son opposition, alléguait que le demandeur ayant commencé l'exécution de son jugement sous ce mode, et ayant privé le dit opposant de l'exercice de sa créance, contre les dits tiers-saisis, ne pouvait procéder à la saisie des terres avant d'avoir épuisé la dite saisie-arrêt. Il concluait en conséquence à la main-levée de la saisie.

Le demandeur répondit à l'opposition que l'un des tiers-saisis avait déclaré devoir £20, mais était insolvable, et que l'autre avait déclaré ne devoir que £1 14 0. Que le défendeur, opposant, devait déposer le montant du jugement en capital, intérêt et frais de la saisie-arrêt, s'il voulait être réintégré dans ses droits contre les tiers-saisis, et que le demandeur pouvait exercer contre son débiteur tous recours par voie de saisie-exécution, saisie-arrêt, ou autre, dans le but de satisfaire au jugement prononcé.

Le 30 décembre, 1865, (MONK, Juge,) l'opposition fut déboutée avec dépens, mais le jugement ne contient aucun considérant.

La cause fut soumise à la révision de trois juges, par l'opposant, alléguant des irrégularités dans la procédure, et de plus, que les déclarations faites par les tiers-saisis l'avaient été irrégulièrement et sans la connaissance du défendeur, persistant de plus dans sa prétention, que le demandeur devait discuter les tiers-saisis avant de procéder contre les immeubles du défendeur.

La Cour de révision, s'attachant à la question de droit, a déclaré unanimement que le demandeur pouvait employer simultanément tous les moyens légaux de se faire payer du jugement qu'il avait obtenu, sans être obligé de discuter les biens des tiers-saisis, et a confirmé le jugement, " considérant qu'il n'y avait pas erreur."

DOUTRE & DOUTRE, pour l'opposant.

MOREAU, OUMET & CHAPLEAU, pour le demandeur.

SUPERIOR COURT.—MONTREAL.

Before :—Badgley, Justice.

No. 2588. { DAY *Plaintiff.*
 vs.
 { HART *Defendant.*

Held :—That an articulation of facts in the words : “ Is it not true that the allegations, matters and things set forth in “ the plaintiff’s declaration in this cause “ filed, are true and well founded in fact,” will be rejected with costs, as being no articulation of facts under the statute, and as insufficient and irregular.

Jugé :—Qu’une articulation de faits comme suit : “ N’est-il pas vrai que les “ allégations, matières et choses énoncées “ en la déclaration du demandeur, enfilée “ dans cette cause, sont vraies et bien “ fondées en fait,” sera rejetée avec dépens, comme n’étant pas une articulation de faits suivant le statut, et comme insuffisante et irrégulière.

Judgment rendered 30th April, 1866.

BADGLEY, Justice :—In this case two motions have been made by the defendant, one for a commission *rogatoire* to New York, which is supported by affidavit and must be granted, the affidavit being sufficient ; the other for the rejection of the plaintiff’s articulation of facts, which is also granted. The articulation is in these terms : “ Is it not “ true that the allegations, matters and things set forth “ and contained in plaintiff’s declaration, in this cause “ filed, are true and well founded in fact ? ” This is clearly no articulation of facts as required by the statute, and it must be rejected with costs, as being insufficient and irregular. (1)

Motions granted.

DAY, for plaintiff.

HART, for defendant.

(1) Con. Stat. L. C., cap. 83, sec. 87, sub-sec. 2.

BANC DE LA REINE, } DISTRICT DE QUEBEC.
 EN APPEL.

Présents :—DUVAL, Juge-en-Chef, AYLWIN, DRUMMOND,
 MONDELET et TASCHEREAU, Juges.

PACAUD,..... *Appelant.*

et

ROY,..... *Intimé.*

Jugé :—Qu'il n'y a pas appel à Sa Majesté en son Conseil Privé d'un jugement condamnant à une somme de \$40, quoique, faite de satisfaire à ce jugement, l'intimé fut condamné à la contrainte par corps jusqu'à ce qu'il eut ainsi satisfait au dit jugement.

Held :—That there is no appeal to Her Majesty in Her Privy Council from a judgment for a sum of \$40, although, in default of payment of such judgment, the respondent was subjected to the *contrainte par corps* until such time as such judgment would be satisfied.

Jugement rendu le 20 juin, 1866.

L'appelant ayant réussi à faire annuler le jugement rendu contre lui en Cour Inférieure déboutant son action, la Cour d'Appel condamna l'intimé à remettre \$40 au fonds de la municipalité scolaire de la paroisse dans laquelle l'affaire, sujet de l'action, s'était passée, et de plus donna à l'appelant droit de *contrainte par corps* sur l'intimé, s'il se refusait à satisfaire à ce jugement.

L'intimé fit motion pour appel au Conseil Privé de Sa Majesté du jugement rendu contre lui en Cour d'appel, prétendant qu'il avait ce droit d'appel puisque sa liberté était en question, vu la contrainte par corps.

TASCHEREAU, Juge.—Il est évident que, d'après notre loi, la motion pour appel au Conseil Privé de Sa Majesté doit être rejetée. Cet appel aurait peut-être été permis si toute la somme demandée eut été accordée, mais la somme est si petite que l'intimé ne peut invoquer notre statut permettant l'appel en certains cas. L'argent ne doit pas revenir au gouvernement de Sa Majesté, mais bien au fonds de la municipalité, ce qui fait que l'intimé ne peut non plus se prévaloir de cette raison. Il est vrai que la liberté du défendeur en Cour inférieure est en question, mais ici encore il faut suivre la loi qui ne donne pas cela comme une rai-

son d'appel en ce cas, bien qu'il nous soit permis de dire qu'il est injuste que pour une petite portion de terre, ne valant que quelques deniers, que des voisins se disputeraient entre eux, il y aurait droit d'appel au Conseil Privé, tandis que lorsque la liberté, le premier des droits de l'homme, et le plus précieux à ses yeux, est menacée, il ne peut se pourvoir au moyen d'un tel appel.

Judgment.—Take nothing by motion.

PACAUD, pour l'appelant.

TALBOT et TOUSSIGNANT, pour l'intimé.

SUPERIOR COURT.—MONTREAL.

Before :—BADGLEY, Justice,

No. 1902. { HOPPOCK, et al.....Plaintiffs.
vs.
{ DEMERS..... Defendant.

Held :—That in the case of a defendant sued upon a foreign judgment, the Court will grant a motion that the plaintiff produce the note, or bill of particulars, upon which the said judgment was based.

Jugé :—Que dans le cas d'un défendeur poursuivi sur un jugement rendu à l'étranger, la Cour accordera une motion que le demandeur produise le billet, ou compte de particularités, sur lequel le dit jugement a été rendu.

Judgment rendered the 30th April, 1866.

BADGLEY, Justice :—There are two cases brought against the defendant, Demers, upon foreign judgments, and motions have been made in one case that the plaintiffs be held to produce the note upon which the judgment is founded, and in the other, the bill of particulars of the goods sold. In the present case the judgment is alleged to have been rendered on the 5th April, 1858, in the Circuit Court, in the county of Fond-du-Lac, in the state of Wisconsin, and the law permits that actions be instituted upon foreign judgments, and following a decision given some years ago, where an action was brought on a judg-

ment obtained in England, I shall order the bill of particulars to be filed in the one case, and the note in the other.

Motion granted.

LEBLANC, CASSIDY & LEBLANC, for plaintiff.

GIROUARD, for defendant.

SUPERIOR COURT.—MONTREAL.

Before :—BADGLEY, Justice.

No. 2724. { LEFORT.....Plaintiff.
vs.
{ MARIE DIT STE. MARIE.....Defendant.

Held :—That a wife cannot be examined on *faits et articles*, or as a witness against her husband, unless she is a party to the cause and her rights are concerned, but not otherwise.

Jugé :—Qu'une femme ne peut être interrogée sur faits et articles, ou examinée comme témoin contre son mari, à moins qu'elle ne soit partie à la cause et que ses droits y soient en question, mais pas autrement.

Judgment rendered the 30th April, 1866.

BADGLEY, Justice :—This action is brought upon a notarial obligation, made by the defendant, in favor of the plaintiff, in 1837, for moneys lent and advanced. The plea is a plea of payment; and the defendant has moved, "that inasmuch as Catherine Guérin, the plaintiff's wife was *commune en biens* with him at the time the debt was incurred, and still is so, that he be permitted to examine the said Catherine Guérin, on interrogatories *sur faits et articles*."

The principle laid down is, that a wife may be examined when she is in the cause, and her rights are concerned, but when the husband alone is sued, as in this case, she cannot be examined on *faits et articles*, or as a witness against her husband.

Motion rejected.

MOREAU, OUIMETTE & CHAPLEAU, for plaintiff.

LANCOT & LAURIER, for defendant.

COUR SUPERIEURE.—MONTREAL.

Présents :—SMITH, BADGLEY et BERTHELOT, Juges.

EN REVISION.

No. 547. { KING *Demandeur.*
 { vs.
 { CONWAY..... *Défendeur.*

Jugé :—Qu'une stipulation contenant antichrèse, faite sous l'opération de l'acte de 1853, ch. 85, sec. 1, doit être maintenue, et que, dans l'espèce, cette stipulation devant avoir effet comme bail, jusqu'au remboursement du principal, il n'y avait pas lieu à la tacite réconduction d'année en année, de manière à faire présumer un délai pour le paiement du principal.

Held :—That a covenant containing antichrèse, made under the operation of the act of 1853, ch. 85, sec. 1, must be maintained, and that, in the case submitted, such covenant, having the effect of a lease, until repayment of the principal, there could be no *tacite réconduction* from year to year, so as to cause a presumption of delay for payment of the principal.

Jugement rendu le 30 mai, 1866.

L'action était fondée sur une obligation pour la somme de \$120, dont acte passé devant notaires, et consentie par le défendeur en faveur de Patrick King. Le paiement devait s'en faire sous quatre ans, à compter du 1er de mai, 1856, sans intérêt, le défendeur hypothéquant pour sûreté du paiement un terrain décrit dans l'acte. Et il était stipulé que, jusqu'au paiement du principal de l'obligation, King aurait l'usage du terrain ainsi hypothéqué, et de partie de la maison qui était dessus et dont il était alors en possession, cette jouissance lui étant ainsi accordée au lieu d'intérêt sur le prêt, et cette convention devant être considérée comme un bail suffisant.

Patrick King transporta, par acte notarié du 9 mars, 1857, au demandeur, le montant de la susdite obligation, ainsi que le droit de jouissance du terrain et de partie de la maison ci-dessus mentionnés. Le défendeur, présent à l'acte de transport, en accepta la signification et consentit que le demandeur jouit du terrain et des dépendances de même que King eût pu le faire.

Le défendeur, par exception, plaida que la stipulation

relative à l'usage du terrain et logement était nulle et de nul effet pour l'excédant de la valeur du loyer sur le montant de l'intérêt légal de la somme prêtée, et que cet excédant était un intérêt usuraire défendu par les lois en force lors des stipulations susdites. Que la valeur de cette occupation était d'au moins trois piastres par mois, et qu'ainsi le demandeur ayant occupé le dit terrain et logement depuis le 9 mars, 1857, date du transport, jusqu'au jour de la défense, 2 novembre, 1864, se trouvait avoir retiré £54 sans cause légitime, que le défendeur disait avoir droit d'opposer en compensation du capital de l'obligation, et jusqu'à concurrence.

Par une seconde exception, le défendeur alléguait que le demandeur ayant commencé une nouvelle année d'occupation du dit immeuble, depuis le 1er de mai précédent, devait être considéré comme ayant donné une autre année de délai au défendeur, et que, partant, son action était prématurée.

La preuve quant à la valeur du loyer était contradictoire, les témoins du demandeur la portait à une somme bien moindre que ceux du défendeur.

La cause ayant été entendue sur le mérite, jugement intervint le 30 novembre, 1865, en faveur du demandeur, et sans égard aux exceptions du défendeur, dont il n'est pas même fait mention dans ce jugement dont suit la teneur :

MONK, Justice :—The Court, &c.—It is considered and adjudged that the plaintiff do recover from the defendant the sum of £30 current money of the province of Canada, amount of the obligation made and consented by the defendant to and in favor of one Patrick King, bearing date and executed at Montreal on the 19th February, 1856, before J. Smith and colleague, notaries, and transferred and made over by the said Patrick King to the plaintiff in this cause, by deed passed before the said J. Smith and his

colleague, notaries, on the 9th March, 1857, duly accepted by the said defendant; with interest from the 23rd September, 1864, date of the service of process, until actual payment, and costs of suit.

Le défendeur inscrivit la cause pour révision. Dans son factum, il disait que : "L'antichrèse n'était permise en France que lorsque la valeur du revenu de la propriété n'excédait pas l'intérêt légal de la somme prêtée.

" Ceci est établi par tous les auteurs. (1)

" Et notre statut, tout en abolissant les peines portées contre l'usure par les anciennes lois, déclare néanmoins que les conventions stipulant un intérêt plus élevé que l'intérêt légal, *seront nulles quant à l'excédant, qui pourra être appliqué en compensation de la dette.* (2)

" Cette loi s'applique à toute convention faite entre le 24 mars, 1853, et le 16 août, 1858.

" Or, celle en question en cette cause remonte à 1856 et 1857.

" Et la loi de 1853 est encore en force pour les conventions faites alors." (3)

Ces raisons n'ont pu prévaloir en révision, et la Cour a confirmé le jugement rendu en premier lieu, en prononçant comme suit : "The Court, &c.—Considering that there is no error in the judgment rendered, &c., it is considered and adjudged that the same be, and it is in all things affirmed, with costs, &c."

NAGLE, pour le demandeur.

JETTÉ et ARCHAMBAULT, pour le défendeur.

(1) Pothier, *Traité de l'Hypothèque*, ch. 5, art. 1er, *in fine* :—Guyot, *Repert.*, vbo. Antichrèse :—Merlin, *Repert.*, vbo. Antichrèse :—Ancien Denisart, vbo. Antichrèse :—Troplong, *Prêt*, No. 389.

(2) *Stat. Ref. du Canada*, ch. 58, sec. 1.

(3) 22 *Vict.*, chap. 85, sec. 1.

BANC DE LA REINE, } DISTRICT DE QUEBEC.
EN APPEL.

Présents :—DUVAL, Juge-en-Chef, AYLWIN, DRUMMOND,
 MONDELET et BADGLEY, Juges.

O'NEIL..... *Appelante.*
 et
 LE MAIRE DE QUÉBEC, etc..... *Intimés.*

Dans une action en dommages portée contre la Corporation par une personne qui avait été frappée par un cheval échappé :

Jugé :—1o. Que la Corporation n'est pas responsable des dommages causés par le mauvais état des chemins, bien que les rues soient sous son contrôle, et que l'acte d'incorporation de la Cité (3 et 4 Vict., cap. 33) n'a pas eu l'effet de modifier ou d'altérer en aucune manière la 39 Geo. III, cap. 5, sect. 11.

2o. Que la Corporation, quoiqu'obligée de poursuivre ceux qui sont en contravention sous ce rapport avec les lois de police, n'est pas responsable des dommages résultant de la négligence des propriétaires ou locataires.

In an action of damages brought against the Corporation by an individual injured by a run-away horse :

Held :—1o. That the Corporation is not responsible for the damages caused by the bad state of the roads, although the streets are under its control, and that the act incorporating the City (3 & 4 Vic., cap. 33) has not had the effect of modifying or altering in any manner the 39 Geo. III, cap. 5, sect. 11.

2o. That the Corporation, although obliged to prosecute those who, in that respect, violate the rules of Police, is not responsible for damages resulting from the negligence of proprietors or lessees.

Jugement rendu le 20 juin, 1866,

L'action était en dommages, réclamés de la Corporation de la cité de Québec pour les causes suivantes, alléguées en la déclaration de l'appelante :

Le 20 février, 1864, l'appelante avait été violemment renversée par un cheval échappé, appartenant à M. La Bilodeau, près de la porte Saint-Jean, et avait été gravement blessée ; ses jours avaient été mis en danger et elle s'était trouvée dans la nécessité de demeurer plusieurs semaines dangereusement malade à l'Hôtel-Dieu de Québec, et sa santé en avait été gravement altérée, et l'accident l'avait mise dans l'impossibilité de gagner sa vie.

L'appelante alléguait ensuite que si le cheval de M. Bilodeau, cause immédiate de l'accident, s'était échappé, cela était dû au mauvais état du chemin ou de la rue, par un cahot qui se trouvait à cet endroit. Après avoir

allégué que le conducteur de la voiture avait usé de toute la prudence possible, elle représentait que ce chemin était sous le contrôle de la Corporation, qui est obligée de le tenir en bon ordre, et concluait de cela que les intimés étaient responsables de l'accident qui lui était arrivé, et demandait des dommages.

A cette action les intimés plaidèrent par une défense au fonds en faits, et par une exception péremptoire en droit perpétuelle. Parmi les allégations de ce dernier plaidoyer, les intimés prétendaient que si l'appelante avait quelque droit, elle ne pouvait l'exercer que contre M. Bilodeau, le propriétaire du cheval échappé, et l'auteur immédiat de l'accident dont elle se plaignait.

L'action fut renvoyée en Cour Supérieure et la demanderesse interjeta appel de ce jugement, et prétendit en Cour d'Appel que, par la sect. 48 du ch. 35 de la 3 et 4 Vict., acte incorporant la cité de Québec, la Corporation était dans l'obligation d'entretenir les chemins de la ville, et en général toutes les rues en dedans des barrières, et qu'à cet effet il y avait un comité des chemins de nommé, et qu'en outre la 18 Vict., chap. 159, autorisait la nomination d'un inspecteur des chemins, dont l'unique fonction était de voir au bon entretien des chemins et des rues de la ville; que ces différents actes prouvaient suffisamment l'obligation de la Corporation de tenir les chemins en bon état, et qu'enfin, si elle était ainsi obligée à tel entretien et qu'elle négligeait ses devoirs, elle devait être tenue responsable de tous les accidents qui pouvaient arriver par suite de sa négligence.

BAILLARGÉ, pour les intimés :—La 1^{ère} question est de déterminer si la rue en question est sous le contrôle de la Corporation, et si cette dernière était tenue par la loi de l'entretien de cette rue pendant l'hiver. Pour résoudre cette question, il suffit de référer à la 39^{me} Geo. III, ch. 5, sect. 11, disposition qui est encore en force aujourd'hui

suivant les prétentions des intimés, et que l'acte d'incorporation de la cité de Québec n'a pu en aucune manière modifier. Cet acte plus haut cité ordonne que, vu la difficulté et les grandes dépenses qu'entrenne le nettoyage des rues pendant l'hiver, lorsque tel nettoyage est fait par des personnes nommées par la Corporation, que chaque propriétaire ou locataire sera tenu d'entretenir leurs chemins d'hiver devant leurs maisons, emplacements ou terrains respectivement. Il est bien évident que l'accident étant arrivé pendant l'hiver, la Corporation ne peut en être tenue responsable, puisque, d'après cette disposition précise de la loi, elle n'est pas tenue à l'entretien des rues à cette époque. Le seul devoir des officiers de la Corporation est de poursuivre ceux qui, négligeant l'entretien de leur part de chemin, encourent pour cela une pénalité, et en effet une sommation avait été servi le jour même sur la personne obligée à l'entretien de la rue. De plus, il n'y a pas d'action directe contre une Corporation publique pour négligence d'entretien de chemins, mais l'on doit procéder par *presentment* ou par indictment. D'ailleurs, un corps public ne peut être responsable d'une faute légère, il faut, pour cette responsabilité, une négligence coupable, et ce n'est pas le cas ici. (1)

BADGLEY, Juge :—Quant à la question de fait, il n'y a pas le moindre doute que l'appelante a souffert des dommages causés par le mauvais état des chemins, mais qui doit en être responsable ? c'est la personne qui était obligée à l'entretien des rues pendant l'époque dans laquelle l'accident est arrivé ; mon avis est que c'est la 39 Geo. III, qu'il faut appliquer dans l'espèce, car je ne vois pas ce qui aurait pu rappeler ou modifier cette ordonnance, or, en admettant l'autorité de cet acte, il n'y a pas à hésiter, et l'action doit être renvoyée.

(1) *Morey vs. The Town of Newfane*, 8 Barb. 645 :—*Bartlett vs. Crozier*, 17 Johns Rep. :—*Russell vs. The of Men Devon*, 2 Term Rep., 667 :—*Mayor of Lynn vs. Turner*, Cowp., 86 :—*Mower vs. Leicester*, 9 Mass. R., 247 :—*The People vs. Adsit*, 2 Hill, 619 :—*Bro. Abr. title Sur le cas*, 93 :—*Reddle vs. The proprietor of the Locks and Canals on the Merrimac River*, 7 Mass. Rep., 169.

DUVAL, Juge-en-Chef: — Il s'agit entièrement d'une question de droit, c'est-à-dire de savoir si la Corporation est responsable. D'après notre Statut, il est évident qu'elle ne l'est pas par elle-même, maintenant les locataires ou propriétaires ne sont nullement ses mandataires, ou agents, ou employés, pour tenir en bon état les chemins, nous sommes donc d'opinion de confirmer le jugement qui ne reconnaît aucune responsabilité de la Corporation dans l'accident arrivé à l'appelant, et qui fait le sujet de cette action.

HOLT et IRVINE, pour l'appelante.

BAILLARGÉ, pour les intimés.

BANC DE LA REINE, } DISTRICT DE QUEBEC.
EN APPEL.

Présents:—DUVAL, Juge-en-Chef, AYLWIN, MEREDITH,
DRUMMOND et MONDELET, Juges.

LAROCHELLE,*Appelante.*

et

MAILLOUX, *et ux.*,*Intimés.*

Jugé:—Que la négligence ou le refus de la part d'une femme de se conformer à un jugement de la Cour, qui ordonne la confection d'un inventaire, ne la soumet pas à la contrainte par corps pour mépris de Cour, et que le droit de contrainte par corps n'existe pas contre la femme coupable de telle négligence ou de tel refus.

Held:—That the neglect or refusal on the part of a woman to comply with a judgment of the Court, which orders the making of an inventory, does not make her liable to a *contrainte par corps* for a contempt, and that the right of *contrainte par corps* does not exist against women guilty of such neglect or refusal.

Jugement rendu le 20 juin, 1866.

L'appelante avait été condamnée, par le jugement du 6 mai, 1865, à faire inventaire de certains biens qu'elle possédait en commun avec les intimés. Le notaire nommé par la Cour pour faire cet inventaire fit signifier à l'appelante deux avis l'informant que tels jours il se rendrait à son domicile pour procéder au dit inventaire. L'inven-

taire n'ayant pas été fait, les intimés prirent une règle pour contrainte par corps contre l'appelante, vu qu'elle n'avait pas procédé à l'inventaire conformément aux avis qui lui avaient été signifiés, et qu'elle s'était rendue, en conséquence, coupable d'un mépris de cour, et concluant à ce qu'elle fut emprisonnée jusqu'à ce qu'elle eut obéi et obtempéré au jugement ordonnant de faire l'inventaire. Au soutien de cette règle, les intimés alléguèrent que la conduite de l'appelante leur donnait tout lieu de croire qu'elle se refuserait toujours à faire inventaire, et qu'ainsi ils souffriraient de graves dommages.

Sur cette règle pour contrainte par corps, la Cour Supérieure prononça le jugement suivant :

“ La Cour, etc.—Considérant que la dite Dame Marie-Cécile Larochelle a négligé et refusé de se conformer au jugement rendu en la présente cause le 6 mai, 1864, ordonnant entre autres choses que, par J. B. Delâge, de la cité de Québec, écuyer, notaire, il serait procédé à faire bon et loyal inventaire des biens, meubles et immeubles, composant la communauté avec les demandeurs, pour être ensuite le dit inventaire clos et affirmé en justice, en la manière ordinaire et accoutumée, puis être procédé devant le dit Delâge au partage des biens de la dite communauté, tel que détaillé au dit jugement, et que la dite Dame Marie-Cécile Larochelle a négligé et refusé de procéder à l'inventaire susdit, en obéissance au jugement susdit, adjuge et ordonne qu'il émane contre elle, en la présente cause, un writ ou bref de contrainte par corps, et qu'en vertu d'icelui elle soit arrêtée, prise et détenue dans la prison de ce district de Québec, jusqu'à ce qu'elle se soit conformée et ait obéi à cette partie du dit jugement du 6 mai dernier, ordonnant qu'il soit procédé à tel inventaire.

C'était de ce jugement que l'appelante se plaignait par son appel. Et elle alléguait, comme ses raisons de faire réformer ce jugement, les deux propositions suivantes :

1° La contrainte par corps, et c'était une disposition formelle de notre droit, ne saurait atteindre la femme, qui en est spécialement exempte, si ce n'est comme marchande publique, ou pour cause de stallionat procédant de son fait. 2° L'obligation de faire inventaire, dans tous les cas, que ce soit de la loi même ou d'un jugement que cette obligation procède, ne pouvait entraîner la contrainte par corps, et le refus ou négligence de faire inventaire, quoiqu'il fût ordonné par un jugement, ne constituait pas un mépris de Cour, ni une offense punissable par l'emprisonnement.

En appel, les intimés citèrent à l'appui de leurs prétentions la cause de Bachelette dit Crébassa vs. Gamache, (1) où les mêmes procédures avaient été suivies et où la contrainte par corps avait été ordonnée. Ils prétendirent, de plus, que toute contravention et refus d'exécution d'un jugement est un mépris de cour, et citaient la cause de Rex vs. Coates, N° 111, où le Juge-en-Chief Sewell avait exprimé l'opinion que : "Every resistance of a process is a contempt."

La Cour d'Appel infirma, par le jugement suivant, la décision rendue en Cour Supérieure :

"The Court, &c.—Considering that by law the appellant, Marie-Cécile Larochelle, is not subject to the *contrainte par corps* ordered to issue against her by the judgment of the Superior Court, of the fourth day of February, one thousand eight hundred and fifty-five, by reason of the neglect and refusal to make an inventory of the moveables and immoveables which composed the community of property which heretofore existed between the late Joseph Martineau and Marguerite Renaud, his wife, and also the said community continued between the said Joseph Martineau, his children and the said Marie-Cécile Larochelle, and that, therefore, in the judgment of the

(1) 1855, C. S., No. 595.

Superior Court, ordering such *contrainte par corps* to issue against the said Marie-Cécile Larochelle, there is error, this Court doth reverse, annul and set aside the judgment so rendered by the Superior Court, and doth discharge the rule obtained in the Superior Court by the respondent for such *contrainte par corps* against the said appellant, &c."

TALBOT ET TOUSIGNANT, pour l'appelante.

BOSSÉ ET BOSSÉ, pour les intimés.

BANC DE LA REINE, } DISTRICT DE QUEBEC.
EN APPEL.

Présents :—DUVAL, Juge-en-Chef, AYLWIN, MEREDITH,
DRUMMOND et MONDELET, Juges.

BROWN,.....Appelante.

et

LOWRY,.....Intimé.

Jugé :—Qu'il n'y a pas appel à la Cour de Révision d'un jugement taxant un mémoire de frais à une somme de moins de vingt-cinq louis.

Held :—That there is no appeal to the Court of Review from a judgment taxing a bill of costs amounting to less than twenty-five pounds.

Jugement rendu le 20 juin, 1866.

Cet appel était d'un jugement rendu par la Cour Supérieure, siégeant à Québec, en Révision, par lequel elle s'était déclarée incompétente à réviser la taxation d'un mémoire de frais faite par un juge de la Cour Supérieure pendant le terme de Circuit à Trois-Rivières. La cause fut inscrite en Révision par l'appellant pour faire réviser la taxation du mémoire de frais par lequel il se trouvait lésé. L'intimé fit motion à l'effet de faire rayer l'inscription en révision, parce que, disait-il, la Cour n'avait pas le droit de réviser une taxation faite par un juge de la Cour Supérieure. Cette Cour, composée des juges Badgley, Stuart, et Taschereau, *dissidente*, rendit le jugement suivant le 2 septembre, 1865 :

“ La Cour, ayant entendu la demanderesse et l'intervenant par leurs procureurs respectifs, sur la motion faite devant cette Cour, le premier de septembre courant, de la part du dit intervenant, à l'effet que l'inscription en révision en cette cause soit rejetée avec dépens, en autant que le droit de faire réviser la taxation du mémoire de frais par cette Cour n'existe pas, et la demanderesse ayant montré cause *instanter* contre la dite motion ; considérant que la dite motion est bien fondée, accorde la dite motion, en conséquence rejette et met de côté la dite inscription.”

L'appelante prétendit que cette récusation de la Cour Supérieure était repoussée : 1° Par notre loi statutaire qui a créé ce tribunal : 2° Par l'ordonnance de 1667, qui statue et décrète qu'il y aura appel de la liquidation et taxation des dépens au tribunal même qui aura rendu et prononcé le jugement final. Comment, disait l'appelante, la Cour Supérieure pouvait-elle se récuser, puisque c'était elle-même qui avait rendu le jugement final ? (1) Ce jugement de taxation était de plus définitif et exécutoire, il était donc de la compétence de la Cour Supérieure.

L'intimé prétendit qu'il ne pouvait y avoir appel à la Cour de Révision sur un jugement taxant un mémoire de frais : 1° Parceque la Cour de Révision était une Cour de la même nature que la Cour d'Appel, et que si la législature eut voulu considérer les jugements tel que celui en question comme sujets à Révision, elle aurait employé des expressions expresses et non pas les mêmes termes que ceux qu'elle avait employé pour la Cour du Banc de la Reine en appel :

2° Parceque, d'après la 151e section du cap. 83, S. R. B. C., il était évident qu'il eût fallu une disposition expresse de la loi pour étendre ce pouvoir de réviser la taxation

(1) 27 et 28 Vict., ch. 39 :—Ordon. 1667, tit. 31, art. 30 :—1 Pigeau, p. 874, Ed. 1779 :—Rodier sur l'art. 5, tit. 31, de l'Ordonnance de 1667 :—2 Jousse, art. 28, tit. 31, Ordon. 1667 :—5 Guyot, Rept., vbo. Dépens, p. 444 :—9 Pothier, p. 163, Ed. Dupin.

d'un mémoire de frais à la Cour de Révision, qui est composée de trois juges; en effet, le statut disait expressément que: " Le mémoire de frais sera sujet à être révisé par un juge de la Cour Supérieure dans le même district et au même endroit."

L'intimé prétendit, de plus, que, d'après l'ordonnance de 1667, tit. 31, arts. 15 et 30, les frais taxés ne pouvaient constituer le sujet d'un appel, car au Chatelet de Paris les frais étaient d'abord taxés par les *commissaires examinateurs* et de là on pouvait appeler à la Cour pendant l'audience, mais cela ne constituait pas ce que l'on peut nommer un appel, tel que l'appelant le prétendait, car ce n'était qu'une requête présentée au Juge d'une Cour se plaignant du fait d'un officier de cette même Cour. C'était justement la même procédure que celle imposée par notre statut, qui permet que les mémoires de frais taxés par le greffier ou le protonotaire puissent être révisés par un juge de la Cour Supérieure.

La Cour d'appel confirme unanimement le jugement rendu en révision, pour les motifs suivants exprimés en son jugement :

The Court, &c.—" Considering that the matter in dispute in this cause does not amount to the sum of twenty pounds sterling, and relates to a question of costs merely, doth in consequence confirm the judgment rendered by the Court of Revision, sitting at Quebec, on the second day of September, one thousand eight hundred and sixty-five, and doth condemn the said appellant to pay to the said respondent his costs in the present appeal.

PACAUD, pour l'appellant.

HART et McDUGALL, pour l'intimé.

COUR DE CIRCUIT.—QUEBEC.

Présent :—STUART, Juge.

No. 627. { RESCHE.....*Demanderesse.*
 { RATTÉ, et al.....*Défendeurs.*
 VS.

Jugé :—1o. Que les grand pères et grand' mères doivent des alimens à leurs petits enfans en bas âges et indigens.

2o. Que, dans l'espèce, l'action de la demanderesse était bien dirigée contre les défendeurs.

Held :—1o. That grand fathers and grand mothers are bound to furnish sustenance to their grand children who are poor and in infancy.

2o. That, in the case submitted, the action of the plaintiff was properly brought against the defendants.

Jugement rendu le 23 mai, 1865.

La demanderesse par son action alléguait qu'elle était mère de deux enfans en bas âge, issus de son mariage avec Michel A. Ratté, un des défendeurs; qu'elle était pauvre, sans ressources, et qu'il lui était impossible de procurer à ses enfans les alimens nécessaires à la vie; que dans le courant de mars, 1864, le dit Michel Ratté avait, sans aucune raison, laissé son domicile conjugal pour aller vivre avec sa mère, Marie Dignard, défenderesse en cette cause, laissant ainsi sa femme et ses enfans sans secours. La demanderesse alléguait, de plus, que la défenderesse avait une existence aisée et qu'elle pouvait venir en aide à ses petits enfans; qu'elle faisait vivre à sa table son fils le défendeur et l'empêchait de procurer le nécessaire à sa famille; et elle concluait à ce que les défendeurs fussent condamnés à lui payer £12 5s. de pension alimentaire pour l'année expirée au mois de mars, 1865, et la même somme pour l'année à échoir au mois de mars, 1866, payable par quartier et d'avance.

A cette action le défendeur fit défaut, et la défenderesse plaida que la demanderesse n'avait pas droit d'action contre elle; de plus, elle niait les allégations de l'action, et par exception disait que le défendeur s'était marié à la

demanderesse contre le gré et sans le consentement de la défenderesse, lorsqu'il était encore mineur; que la demanderesse et le défendeur étaient jeunes et capables de pourvoir aux besoins nécessaires à leur famille, tandis qu'elle, la défenderesse, était âgée de soixante ans, pauvre, et gagnait sa vie en travaillant à la journée. La preuve démontra que la demanderesse était incapable de gagner sa nourriture et celle de ses enfants, qu'elle vivait depuis longtemps à la table d'un de ses frères, qu'elle et ses enfants étaient dans l'indigence; que la défenderesse, au contraire, par son travail réalisait chaque mois une somme de \$15 à \$20, et qu'elle pouvait facilement procurer des alimens à la demanderesse et à ses enfants, de plus, que la défenderesse nourrissait à sa table le défendeur, et un de ses frères, sans aucune rémunération.

TOUSIGNANT, pour la demanderesse, soutint alors qu'il avait parfaitement prouvé sa cause et que le droit d'action de la demanderesse ne devait pas être nié. (1)

ANGERS, pour la défenderesse, maintint qu'en dépit de la preuve faite en la cause, la défenderesse ne devait pas être condamné à fournir des alimens à la demanderesse et à ses enfants, et que l'action, quant à la défenderesse, devait être déboutée. (2)

La Cour condamne les défendeurs solidairement au paiement de la somme de \$20, avec dépens.

TALBOT et TOUSIGNANT, pour la demanderesse.

CASAULT, LANGLOIS et ANGERS, pour les défendeurs.

(1) 1 Guyot, *Rep.*, vbo. *Aliments*, p. 317 :—Pothier, *Traité du contrat de mariage*, no. 387.

(2) 4 Domolombe, pp. 35 et 36, no. 33.

BANC DE LA REINE, } DISTRICT DE MONTREAL.
 EN APPEL.

Présents :—DUVAL, Juge-en-Chef, AYIWIN, MEREDITH,
 DRUMMOND et MONDELET, Juges.

SEGUIN DE LASALLE.....Appelante.
 et

BERGEVIN.....Intimé.

Jugé :—Qu'un billet notarié en brevet
 n'est pas soumis à la prescription de cinq
 ans, établie par le Stat. Ref. pour le Bas-
 Canada, cap. 64.

Held :—That a notarial note *en brevet*
 is not subject to the prescription of five
 years, established by the Con. Stat. for
 Lower Canada, cap. 64.

Jugement rendu le 7 mars, 1865.

L'action portée devant la Cour Supérieure à Montréal
 était pour le recouvrement du montant de deux recon-
 naissances devant notaires, en brevet, par un nommé
 Lormand en faveur de Ernest Boullenois, mari décédé
 de l'appelante, et dont le défendeur se porta caution soli-
 daire. La première de ces deux reconnaissances, en date
 du 24 de juillet, 1854, était pour vingt-cinq louis, pour
 valeur reçue, que Lormand s'obligea de payer au créancier,
 ou à son ordre, dans deux mois. La seconde reconnaissance,
 en date du 15 de janvier, 1855, était pour vingt-six louis
 cinq chelins, pour valeur reçue, en argent prêté, et payable
 au dit Boullenois, ou à son ordre, le 18 août, 1855. Dans ce
 dernier acte le défendeur se porta caution conjointement
 avec un nommé Hénault. L'appelante déclarait qu'il avait
 été payé \$50 sur la première obligation, et réclamait
 comme balance, en principal et intérêt sur cette recon-
 naissance, \$69.68, et la totalité de la deuxième, savoir :
 \$160.05.

Le défendeur, poursuivit seul, plaida que ces deux
 reconnaissances, qu'il désignait comme des *billets*, étaient
 prescrites suivant les dispositions du Statut, (1) dont la

(1) Ch. 64 des Statuts Refondus pour le Bas-Canada.

section 31 est ainsi conçue : “ et *tous billets*, dûs et payables “ dans le Bas-Canada, etc., seront censés absolument payés “ et acquittés, si une poursuite ou action n’a pas été intentée “ dans les cinq ans qui suivront le jour où ces billets sont “ devenus dûs et payables ; ” et dont la troisième section porte que “ tout billet payable à l’ordre du faiseur ou du “ tireur, sera considéré comme négociable, et sera trans- “ férable par endossement régulier ou en blanc, ou par “ délivrance, etc. ”

Le défendeur plaida de plus, quant à la seconde reconnaissance, que Hénault, son cofidélusseur ayant été déchargé de son cautionnement par le procureur de Boullenois, lui, Bergevin, ne pouvait être condamné que pour moitié de la dette. (1)

L’appelante répondit que ces actes en brevet n’étaient pas des billets promissoires tombant sous le coup du Statut, mais des obligations authentiques qui ne pouvaient se prescrire que par trente ans, et que d’ailleurs la demanderesse était absente. Quant à la décharge de Hénault, elle alléguait que cette décharge était sans valeur, le procureur n’étant pas autorisé à l’accorder. (2)

Le 24 mars, 1864, la Cour Supérieure rendit le jugement suivant :

“ La Cour, après avoir entendu les parties par leurs “ avocats, en droit et mérite, renvoie la réponse en droit à “ l’exception de prescription plaidée par les défendeurs, “ maintient la dite exception de prescription, et en conséquence déboute cette action avec dépens. ”

(1) Merlin, Rep., vbo. Billet :—3 L. C. Jurist, p. 55 :—6 L. C. Jurist, pp. 257, 299, 339 :—9 L. C. Rep., p. 418 :—Pothier, Obl., nos. 85, 87, 427, 587 :—7 Toullier, no. 172.

(2) 2 Savary, pp. 587, 588, 606 :—2 Journal des Aud., p. 287 :—Lavoie et Crevier, 9 L. C. Rep., 418 :—2 Revue de Lég., p. 31, no. 39 :—No. 2589, Stevens vs. Lyman, Montréal, 25 oct., 1848 :—Hart vs. McPherson, 31 janvier, 1848 :—Pardeusss, Change, no. 69 :—Troplong, Vente, p. 403 :—Dalloz, Rec. Périodique, 1833, p. 354 :—7 L. C. Jurist, 289 :—2 Bornier, Conférence des Ord., p. 548 :—Ferrière, Dict. de Droit, vbo. Billet :—Pothier, Obl., no. 608 :—2 Rogue, p. 138 :—1 Ferrière, G. Cou- unier, p. 1335, :—1 Parsons on Notes, p. 26 :—Angell on Limitations, p. 216 :—Pothier, Obl., pp. 316, 367.

L'appel de cette décision a été soutenu.

MONDELET, Juge : — L'action en Cour de première instance était fondée sur un billet en brevet, passé par-devant deux notaires. Le défendeur plaida plusieurs exceptions. La seule dont il s'agisse ici est celle par laquelle le défendeur a plaidé la prescription de cinq ans. Cette exception a été rencontrée par une réponse en droit.

Il paraîtrait que bien que les parties aient été entendues en droit et au mérite, l'action a été déboutée sur le plaidoyer de prescription de cinq ans. De fait, le jugement maintient la dite exception de prescription, et, en conséquence, déboute cette action avec dépens.

Je n'ai aucun doute quant à la question. Un billet en brevet, reçu devant deux notaires, n'est pas du tout un billet de la catégorie de ceux à l'encontre desquels existe, par statut, la prescription de cinq ans. Sous ce rapport, je partage entièrement les opinions des Juges Berthelot, Loranger et Laberge, qui ont jugé dans ce sens, et je pense, par conséquent, que le jugement dont il est question est mal fondé en loi.

Il me semble que la Cour d'Appel doit renverser le jugement du 24 mars, 1864, et renvoyer le dossier à la Cour de première instance, pour y être procédé à rendre tel jugement au mérite que la Cour avisera. N'y eût-il pour justifier ce renvoi, que l'absence d'un motivé quelconque sur le mérite de la cause, dans le jugement dont est appel, il y en aurait assurément bien assez. Mais, de fait, il paraît évident, que le savant Juge n'a pas jugé le mérite de la cause, et c'est ce qu'il est nécessaire qu'il fasse.

Le jugement en appel est motivé comme suit:

“ La Cour, etc.—Considérant que le document sur lequel repose l'action des demandeurs en Cour de première instance, appelants en cette Cour, n'est pas un billet dans le sens de la loi de ce pays, à l'égard duquel la prescription invoquée en cette cause puisse s'appliquer :

“ Considérant, par conséquent, qu'il y a erreur dans le jugement rendu par la Cour Supérieure à Montréal, le 21 mars, 1864, cette Cour casse, annule et met de côté le dit jugement, et procédant à rendre le jugement que la dite Cour de première instance eût dû rendre, il est adjugé et ordonné que la réponse en droit à l'exception de prescription soit et elle est par les présentes maintenue, et la dite exception de prescription déboutée, et que tous les procédés en la dite Cour Inférieure, depuis et compris le dit jugement, soient, et ils sont par les présentes, mis de côté, et il est de plus ordonné que le dossier soit remis à la Cour Inférieure, pour y être procédé suivant qu'il appartiendra. La Cour condamne l'intimé à payer tous les dépens tant en cette Cour que ceux intervenus sur les procédés en la dite Cour Inférieure, depuis et compris le jugement dont est appel, ainsi que l'exception de prescription et la réponse en droit à icelle. ”

GIROUARD, pour les appelants.

DOUTRE et DOUTRE, pour l'intimé.

SUPERIOR COURT.—QUEBEC.

Before :—STUART, Justice.

No. 238. { BETTERSWORTH *Plaintiff.*
 vs.
 { HOUGH..... *Defendant.*

A notice of action to a person acting as a constable, under the 14 and 15 Vic., cap. 54, (Con. Stat. L. C., cap. 101) stated the cause of action to the effect following : "For that you, on the 20th day of December, 1864, unlawfully did apprehend and seize A. B., and unlawfully did keep him a prisoner for a long space of time, to wit : for the space of four days, and other wrongs to the said A. B., then did, &c."

Held.—After a verdict in favor of the plaintiff, upon points reserved at the trial :—10. That an omission to state in the notice the place where the injury complained of was sustained, was fatal to the plaintiff's right to recover : Judgment for the defendant, as in the case of a non-suit, given.

20. That the plaintiff, in his proof, must be limited to the day and the occasion stated in his notice and declaration, when the defendant had been sworn in as a constable ; and that he, the plaintiff, could not extend such proof to the acts of the defendant of the previous day, when the plaintiff was arrested by him, acting as a private individual, so as to obtain damages as arising from them.

Un avis de motion à une personne agissant comme constable, sous l'acte de la 14 et 15 Vict., chap. 54, (Stat. Ref., B.-C., chap. 101) énonçait la cause d'action comme suit : " Parce que, le 20e jour de décembre, 1864, vous avez illégalement pris et détenu A. B., et l'avez illégalement retenu prisonnier pour un long espace de temps, savoir : pour l'espace de quatre jours, et autres torts envers le dit A. B., vous avez commis, etc."

Jugé.—Après verdict en faveur du demandeur, sur questions réservées au procès :—10. Que l'omission d'énoncer dans l'avis la place où l'injure dont on se plaignait avait été commise, était fatal aux droits de recouvrement du demandeur : Jugement pour le défendeur, comme dans le cas d'un non-suit, rendu.

20. Que le demandeur, devait être restreint, dans sa preuve, au jour et à l'occasion énoncés dans sa notice et dans sa déclaration, quand le défendeur avait été assermenté comme constable ; et que lui, le demandeur, ne pouvait faire porter cette preuve sur les actes du défendeur de la journée d'avant, quand le demandeur avait été arrêté par lui, agissant en sa qualité privée, de manière à obtenir des dommages résultant d'eux.

Judgment rendered the 3rd July, 1865.

This was an action for a malicious arrest.—Previous to the 19th of December 1864, a warrant had issued from Montreal for the arrest of a number of persons charged with robbery and murder committed at St. Albans, in the United States, demanded under the treaty between that country and Great Britain.—On the day above mentioned the defendant, who had been occupied with several peace officers in searching for these persons, arrested the plaintiff as one of those named in the warrant, supposing him to be George Scott. The defendant, although in company with one of the constables acting under the warrant, was

not one himself at the time of the arrest on the 19th December, 1864. The plaintiff was taken before Mr. Maguire, Judge of the Sessions at Quebec, on the same day, who, on that day, swore in the defendant as a constable and directed him to take the plaintiff to Montreal as his prisoner, and, when there, before Judge Smith who had issued the warrant. This was done, and, at Montreal, it was discovered that the plaintiff was not the individual named in the warrant as George Scott, and thereupon he was released from custody.

On the 21st day of January, 1865, a notice of action was given as follows :

“ To Charles Hough, of the City of Quebec, Livery
 “ Stable Keeper, acting as and pretending to be a con-
 “ stable or Peace officer within the district of Quebec.

“ We do hereby, as the Attorneys of Joseph F. Betters-
 “ worth, late of Bowling Green, in the state of Kentucky,
 “ and now residing in the City of Montreal, in the Pro-
 “ vince of Canada, a soldier in the army of a certain belli-
 “ gerent power, calling and describing themselves as the
 “ confederate states of America, according to the form of
 “ the statute in such case made and provided, give you
 “ notice, that the said Joseph F. Bettersworth will, at the
 “ expiration of one calendar month from the time of your
 “ being served with this notice, cause a writ of summons
 “ to be issued out of Her Majesty’s Superior Court for
 “ Lower Canada, sitting at Quebec, against you, at the
 “ suit of the said Joseph F. Bettersworth, for that you on
 “ the twentieth day of December, one thousand eight hun-
 “ dred and sixty four, unlawfully did apprehend and seize
 “ the said Joseph F. Bettersworth, and unlawfully did de-
 “ tain and keep him a prisoner for a long space of time, to
 “ wit, for the space of four days, and other wrongs to the
 “ said Joseph F. Bettersworth then did, against the peace
 “ of our Lady the Queen, and to the damage of the said

" Joseph F. Bettersworth of Ten Thousand Dollars. Dated
 " this twenty-first day of January, in the year of our Lord,
 " one thousand eight hundred and sixty-five. HOLT &
 " IRVINE, Attorneys for the said Joseph F. Bettersworth."

The endorsement on this notice was as follows: " The
 " names of the attorneys who will issue the within mentioned
 " writ are Charles Gates Holt and George Irvine, holding
 " their office in St. Peter Street, in the Lower Town of the
 " City of Quebec. HOLT & IRVINE."

This notice was given under the provisions of the Con.
 Stat. for Lower Canada, cap. 101, intituled: " An Act for the
 " protection of Justices of the Peace, Magistrates and other
 " officers in the performance of public duties," the first
 section of which is as follows: " No writ shall be sued
 " out against any Justice of the Peace or other officer or per-
 " son fulfilling any public duty, for anything by him done in
 " the performance of such public duty, whether such duty
 " arises out of the common law or is imposed by Act of
 " Parliament, either Imperial or Provincial, nor shall any
 " judgment or verdict be rendered against him, unless
 " notice in writing of such intended writ, specifying the
 " cause of action with reasonable clearness, has been deli-
 " vered to such Justice, officer or other person, or left at
 " the usual place of his abode, by the attorney or agent of
 " the party who intends to sue out such writ, at least
 " one month before suing out such writ: In computing
 " such month, the day of the service of such notice, and
 " the day of suing out such writ shall both be excluded;
 " and on such notice shall be written the name and place
 " of abode of the Attorney or agent suing out such writ:—
 " and by the cause of action stated in such notice the party
 " suing out such writ shall be bound, and shall not be al-
 " lowed to give evidence of any other cause of action at
 " the trial thereof."

On the twenty-second of February, 1865, a writ of sum-

mons issued. The cause of action stated in the declaration was : " That on the twentieth day of December, now last
 " past, the said plaintiff was at the town of Levis, in the
 " district of Quebec, and was in the peace of Our L^dy the
 " Queen, and following his lawful business and occasions
 " and that, then and there, at Levis aforesaid, on the day
 " aforesaid, the said defendant, with force and arms, did
 " make an assault on the said plaintiff, and seized and laid
 " hold of the said plaintiff, and then and there made him
 " the said plaintiff a prisoner, and deprived him of his per-
 " sonal liberty, and forcibly and violently compelled the
 " said plaintiff to leave the said town of Levis and cross
 " the river St. Lawrence to the City of Quebec, where he
 " the said defendant forced and obliged the said plaintiff
 " to go in and along divers public streets to the private
 " house of the said Charles Hough, where he the said
 " Charles Hough kept and detained the said plaintiff a pri-
 " soner for and during the space of two days, and during
 " the said time committed various assaults upon the per-
 " son of the said plaintiff, and searched his person and ex-
 " posed him to various insults and indignities, contrary to
 " the peace, &c. That the said defendant, in so arresting
 " and imprisoning the said plaintiff, acted maliciously,
 " wickedly, vindictively, and without any reasonable or
 " probable cause, and without any lawful warrant what-
 " ever, &c. That the said plaintiff has given to the said
 " defendant notice of the institution of the present action
 " for more than one calendar month previous to the insti-
 " tution of the same. Wherefore, &c. "

The pleas to the action were 1o. " Not guilty, " and 2o.
 " That one Samuel E. Lackey and others had been de-
 " tained in the gaol at Montreal, charged with the crimes
 " of murder, assault with intent to commit murder and
 " robbery, at the town of St. Albans, in the United
 " States, from which gaol they had escaped, and were
 " released and discharged upon the order of Judge

“ Coursol; that thereupon, Judge Smith issued his warrant for a second arrest of the parties under the provisions of the extradition treaty with the United States, with the execution of which warrant the defendant was entrusted as a constable ; that a proclamation had issued for the apprehension of Lackey and the others, that the plaintiff had been engaged in planning raids on the people of the United States, including the raid upon St. Albans, that the defendant was credibly informed that he was one of the guilty parties—that, even after enquiry on oath made before the Judge of the Sessions at Quebec as to the identity of the plaintiff as one of the parties implicated, there was every reason to suppose that the plaintiff was one of the persons mentioned in the warrant, and it was upon the order of the Judge of the Sessions that the plaintiff was taken to Montreal, &c, that although a mistake had been committed as to the plaintiff being named in the warrant, the defendant had every reasonable and probable cause, &c.”

On this issue the following questions were settled for a jury :

1° Did the said defendant arrest and imprison the plaintiff in the month of December last and where? 2° Had the Honorable James Smith, one of the Judges of the Superior Court for Lower Canada, residing at Montreal, at that time issued his warrant for the arrest of certain persons, and of whom ; upon a charge of murder and robbery committed at the town of St. Albans, in the state of Vermont, one of the United States of America, and was a proclamation duly issued offering a reward for the apprehension of the persons mentioned in the warrant of the said James Smith? 3° Was the said warrant put into the hands of the defendant as a constable or peace officer to be executed? 4° Did the said defendant so arrest the plaintiff and detain him with or without warrant, and with or without reasonable or probable cause? 5° Did the plaintiff suffer any

and what damage from his arrest and detention by the defendant?

On the 28th of April, 1865, the case came on for trial before STUART, Justice, and a special jury.

After the jury was empanelled the first piece of evidence produced by the plaintiff and proved was the foregoing notice.

The plaintiff was then proceeding to prove the arrest at Point Levi, on the 19th of December, and thereupon the following motion was made on behalf of the defendant :

“ Motion, that inasmuch as the notice of action now produced and filed does not state the cause of action with reasonable clearness by shewing where the acts complained of were performed, nor at what time, nor that they were performed maliciously and without reasonable or probable cause ; and inasmuch as by the statute in such case made and provided the plaintiff is bound and is not allowed thereby to give evidence of any other cause of action than that stated in the said notice, and inasmuch as no legal cause of action whatever is stated in the said notice, the plaintiff be precluded from the adduction of evidence in the cause upon the ground that the said notice is no notice of action in conformity with the said statute, and that a non suit be entered.”

G. O. STUART, Q. C., for defendant :—In support of this motion the first ground I have to urge is that the motion does not state the place where the alleged cause of action arose. The first section of the act above cited distinctly enacts, that no writ shall be sued out against any justice of the peace or other officer, unless notice in writing of such intended writ, specifying the cause of action with reasonable clearness, has been delivered to such justice, officer or other person fulfilling any public duty, or left at the usual place of his abode by the attorney or agent of

the party who intends to sue out such writ, at least one month before suing out the same : in the English Statute requiring notice to be given to justices and others, the words corresponding to the above are that in the notice the cause of action must be *clearly and explicitly explained* (24, Geo. II. c. 44), and the whole current of english authorities establish that the notice of action must state the place where the injury complained of was committed, and that wherever it has been omitted the plaintiff has been non suited. In the above notice to Mr. Hough the place *where* is not stated, and the acts complained of may have been committed at Point Levis, at Quebec, at Montreal, Gaspé or Detroit. It is to be observed also that, by our statute, all public officers or other persons fulfilling any public duty are placed on the same footing as justices of the peace. The first leading case on this subject is that of Lovelace vs. Curry, (7 Term R., 631,) and that of Strickland vs. Ward is referred to in a note to it in which it was held that the notice of action must contain a month's notice of the writ or process intended to be sued out as well as the cause of action. Lord KENYON, in rendering judgment in that case, speaking of Judge Yates who tried the case of Strickland and Ward, remarked: "That learned judge ruled, that a notice under this act of Parliament ought to be precise, and said that the magistrate did right in not tendering amends because the notice was not conformable to the statute. And if it were right then, *a fortiori* it is right now, that decision having been acted upon for thirty years and followed by several determinations at *nisi prius*." In the same case, LAWRENCE Justice, said : The statute was made to introduce a strictness of form in favor of justices and it must be observed literally. This case of Lovelace and Curry was tried and the plaintiff non suited on the 14th May, 1798, and the courts had acted on the case of Strickland and Ward, tried in 1767, for upwards of thirty years.

That the courts in England have, uniformly, acted upon

the case of *Lovelace and Curry* down to the present time, requiring in the notice the specification of time and place where the acts complained of were committed, is manifest from many cases. The first is that of *Martins vs. Upcher*, which was decided in the Court of Queen's Bench, in England, upon the objection now raised, viz: that the notice of action did not state the place. This case of *Martins vs. Upcher* was decided in 1842, and is reported at full length in *Adolphus and Ellis, Q. B. R. vol. 3, p. 662*. The following is the marginal note to the case.

"A notice of action to a magistrate under statute 24 Geo. 2, ch. 44, s. 1, must specify the place at which the act complained of occurred. It is not enough that it names the day." "The omission is not cured by the magistrate pleading a tender of amends." The form of notice, omitting the place is given in the report, and Lord DENMAN, in rendering the judgment, said:

"This appears to be the first occasion on which a decision on the point now before us has been called for in Westminster Hall. An inference might be suggested from the point not having been raised in *banc* before: but that, I think, would not be safe. Indeed it is not certain that the question may not have arisen, but have remained unnoticed in the reports, because the actual decisions have been upon other points. I decided, however, on the language of the act which requires that the cause of action shall be clearly and explicitly contained in the notice. Unless both time and place be inserted, the cause is not clearly and explicitly contained. Lord ABINGER, C. B., in *Bennett vs. Broughton*, appears to have thought both necessary. I do not go so far as to say that a party will always be strictly bound to prove the time and place which he names in his notice: but I think the words of the statute require that a time and place for the occurrence be named. It is satisfactory to find that this was Lord ABINGER's opinion and that no objection was

"made in *banc* to his ruling. Then great weight must be attached to the opinion entertained both by Lord Chief-Justice TINDAL and Mr. Baron PARKE, that the place must be part and parcel of the notice. My view is quite in conformity with theirs, and we should introduce an improper doubt if we did not act upon this principle."

WILLIAMS, Justice, concurred and wound up his observation with the following words: "And we find this view confirmed by the decisions which have not been complained of in *banc*."

COLERIDGE, Justice, was of the same opinion, &c., and this judge, in the course of his observations referring to the statute, said: "Look at sec. 5. The evidence is to be limited to what is contained in the notice, therefore, I should have held that the place is an essential ingredient in the notice even without the authority of the three cases at *nisi prius*."

The next case is that of *Breese vs. Jerdein* and others, to be found in the 45 vol. of English common law reports, p. 583. The marginal note of this decision is as follows: "A notice of action against an officer of the metropolitan police under statute 10 Geo. IV, ch. 44, s. 41, must specify the time and place of the act complained of."

The notice to *Jerdein* and the other defendants in this cause was as follows: "You having, on or about the 27th day of May, now last past, caused Daniel Breese of Pwllhele in the county of Carnarvon, gentleman, to be apprehended and detained in custody, without any reasonable or probable cause whatsoever, for the space of three hours then next following, and having afterwards caused him to be unlawfully committed to a certain common gaol or prison called the Compter, in the city of London, and to be imprisoned and kept and detained in prison there, without any reasonable or probable cause

" whatever, for a further space of time, to wit, for the
 " space of twelve hours next following, I do, therefore, as
 " the attorney, of and for the said Daniel Breese in this
 " behalf, hereby give you and each of you notice, according
 " to the form of statute in such case made and provided, that
 " I shall, at or soon after the expiration of one calendar
 " month from the time of your being served with this notice,
 " cause a writ of summons to be issued out of her Ma-
 " jesty's Court of Queen's Bench against you and each of
 " you at the suit of the said Daniel Breeze, for the said
 " apprehension, detention and imprisonment, and shall
 " proceed against you and each of you thereupon according
 " to law. Dated this 11th day of June, 1841. Yours, &c.,
 " ROB. WYNN WILLIAMS, 3, Paper Buildings Temple,
 " London, Attorney for the said Daniel Breese."

At the trial of the above case the Chief-Justice reserved
 the right of the defendant to move for a non suit upon the
 insufficiency of the above notice, which, after a verdict for
 the plaintiff, was done on the 27th April, 1842, before Lord
 DENMAN, C. J. and justices PATTERSON and WILLIAMS.
 Lord DENMAN then stated, in rendering the judgment
 upon the motion for a non suit, that the question was whe-
 ther a notice to one of the defendants, a metropolitan
 policeman, was good, that the statute, 10, Geo. IV, ch. 44,
 in sec. 41, requires notice of the *action and cause of action*,
 and after disposing of two objections he came to the third
 which was, that the want of time and place rendered
 the above notice void on the authority of *Martins*
vs. Upcher. Lord DENMAN added: "The third, (ob-
 "jection) in our opinion, ought to prevail on the principle
 " of the case referred to. The language of statutes 10
 " Geo. IV, ch. 44 and 24, G. 2, ch. 44, is not precisely the
 " same; but we think the meaning is substantially the
 " same and that the same effect must be given to both as
 " was done in *Bennett vs. Broughton*, before Lord ABIN-
 " GER, cited in the Law journal for 1842, Law J. N. S.
 " Q. B. 292."

Comparing the Canadian statute with the English statutes the words in each are substantially the same. The words of the former are: "Unless notice in writing of such intended writ specifying the cause of action with reasonable clearness has been delivered, &c." The words of the English statute, (24 Geo. IV, ch. 44, sec. 1,) are: "The causes of action shall be clearly and explicitly contained in the notice, (and this applies to the case of Martins and Upcher)." The language of the English statute, (10 Geo. 4, ch. 44, sec. 41), is that: "Notice in writing of such action and of the cause thereof shall be given, &c." and applies to the policeman's case, *Breese vs. Jerdein*.

In a case where a notice was declared good, viz, in that of *Jacklin vs. Fytche*, 14 Meeson and Welaby, 380, the above authorities are referred to as law, but attention is particularly called to the notice which was given in that case, to be found, at p. 381 of the report, which was attacked as insufficient, for the purpose of shewing the difference between it and the notice in this suit of *Bettersworth vs. Hough*.

It is as follows:—"I, William Jacklin, of Claythorpe, in the county of Lincoln, laborer, do hereby according to the statute in such case made and provided, give you and each of you notice, that I shall, by my attorney, Mr. Christopher Ingoldby the younger, of Louth, in the said county of Lincoln, gentleman, at or soon after the expiration of one calendar month from your being served with this notice, cause a writ of summons to be sued out of Her Majesty's Court of Exchequer of Pleas, at Westminster, against you at my suit, and proceed thereupon according to law; for that you, on the tenth day of May, in the year of our Lord, 1844, with force and arms, caused an assault to be made upon me, and then caused me to be forced and compelled to go into, along, and through divers public streets and roads, to a certain prison, to wit, at Louth, in the said parts, and to be unlawfully

“imprisoned, and kept and detained in prison there, in a dark and unwholesome place there, without any reasonable or justifiable cause whatever, for a long space of time, to wit, for the space of forty days then next following, contrary to the laws and customs of this realm, and against the will of me, the said William Jacklin, &c.
 “WILLIAM ^{his} ~~×~~ JACKLIN, of the parish of Claythorpe, in the ^{mark.}
 “parts and county aforesaid.”

The facts which Bettersworth, the plaintiff, now attempts to prove are that he was arrested, not on the 20th of the month of December, but on the 19th, that he was on that, the latter day, brought before Judge Maguire, who placed him in the custody of two policemen, who remained with him at Mr. Hough's house pending an enquiry before Judge Maguire, as to the indentity of Bettersworth, and as to his being one of the raiders, which lasted two days, the result of which was that Judge Maguire ordered Hough to take the prisoner to Montreal, before Judge Smith, which he did and thus occupied two days more.

Supposing the facts to be so, an arrest on the 19th and a detention at Hough's house for two days, and on the railway, and in Montreal for two more, let the notice of action as given be applied to them: it states an arrest on the 20th December without stating any place, not even one within the jurisdiction of the court. Then the time is quite indefinite, viz. a detention on the 20th and four days, *Quere*, do they follow the 20th or precede it, or is there an interval between the 20th and the four days, are the days consecutive or is there an interval between each and how long? *non constat*. Then, the action itself is brought for an arrest and a detention of two days, not four, a different cause of action from that contained in the notice. If the plaintiff, at the time he gave his notice, did not know what he intended to sue for, either as respected time or place of a given injury; or if knowing, he concealed it from the

defendant, how could the defendant know the specific injury for which he was called on to tender amends, information of which he was entitled to under the statute, viz: a specification of the cause of action with reasonable clearness. Instead of clearness the plaintiff has covered with complete ambiguity his intentions as respects the time and place of the supposed injury. Then the notice of action is for a four days imprisonment covering two days, partly in the district of Arthabaska and the other intervening districts, through which the railway runs, and partly in the district of Montreal, and our statute provides at Sec. 13, (C. S. L. C., cap. 101): "That any such action against such justice, officer, or other person, acting as aforesaid, shall be laid and tried within the district or circuit where the act complained of was committed."

Again, our statute enacts in the first sub-section as follows: "And by the cause of action stated in such notice the party suing out such writ shall be bound, and shall not be allowed to give evidence of any other cause of action at the trial thereof."

The second ground in support of this motion is, that there is no notice specifying the cause of action with reasonable clearness as to the time when the alleged injury was sustained. Although, as a general rule, time is immaterial if it be stated previous to the bringing of the suit, yet, there are exceptions to this rule and the present case is one. Where there are several causes of action distinct in their nature, and which cannot be joined, it ought not to be in the power of the plaintiff to shape his course so ambiguously as to leave the defendant in doubt as to which he is to defend. Where the allegations are descriptive of the identity of the subject of the action, the plaintiff ought to be limited to them. In this case, the notice establishes the identity of the cause of action, viz: The acts of the defendant on the 20th December and following days as a constable, and the plaintiff ought not to be allowed to

practise a surprise on the defendant by substituting a cause of action, which accrued on the 19th of December, against the defendant in his individual and private capacity. (1)

The third objection to the notice is that it not only does not specify the cause of action with reasonable clearness, but that it does not specify any legal cause of action whatever.

The notice is that you, Charles Hough, "on the 20th December, 1865, acting as and pretending to be a constable, unlawfully did apprehend and seize the said Joseph Bettersworth, and keep him a prisoner for a long space of time, to wit, for the space of four days."

In the cases above cited, the forms of the notice are given in the reports of the cases and every one contains the words "without reasonable or probable cause."

If the defendant, Hough, has acted illegally as a constable as stated in the notice, no action would lie against him for doing so unless he acted maliciously and without reasonable and probable cause. If this be so there is no notice specifying the cause of action with reasonable clearness.

In the case of *Ritchie vs. Flower*, decided at Quebec, it was held that in an action for malicious arrest, the plaintiff must allege and shew in evidence that he was arrested without reasonable or probable cause. (2)

If there is no legal cause of action shewn in the notice, the defendant submits that he is entitled to have the plaintiff non suited for the want of it.

None of the English Judges, down to the present time, have expressed any doubt as to the decisions in *banc* and

(1) 2 Greenleaf on Ev., secs. 61, 63:—2 Greenleaf on Ev., sec. 86:—Archbold, *Crim. pleading*, 176:—*Stants vs. Frickett*, 1 Campbell, 473.

(2) *Robertson's digest of L. C. R.*, p. 133.

at *nisi prius* on the absolute necessity for time and place in the notice Lord TENTERDEN, Lord DENMAN, Lord ABINGER, TINDAL, Chief-Justice of the common Pleas, Baron PARKE, (Lord Wensleydale) and Baron ALDERSON have all united in opinion upon the point.

To the above may be added Lord Campbell. In a recent decision, in which he took part, the Court of Queen's Bench held that the word maliciously should be stated. In this case, *Taylor vs. Nesfield*, (1) the words "without any reasonable or probable cause whatsoever," were inserted in the notice, the action being against a Justice of the Peace for false imprisonment, but the word "maliciously" being omitted, the counsel for the defendant objected that the notice was insufficient, and JERVIS, Chief-Justice, at the trial, maintained the objection. The notice to the magistrate was not sufficiently specific to shew whether sec. 1 or sec. 2, in the same statute, contained the cause of action for which the defendant was sued. On motion for a new trial Lord CAMPBELL said: "I should have striven to support the notice against the objection that the word "maliciously" is not inserted, if that had been the only objection, but it appears to me that the cause of action is not stated in the notice, nothing is clearly and explicitly stated."

ERLE, Justice:—"I also think that this notice is bad for not shewing what the defendant is charged with, and that the act charged was "malicious," and :

CROMPTON, Justice:—"I am of the same opinion, I think "that the Chief-Justice was quite right in holding this "notice to be bad."

In Chitty's Practice in the Court of Queen's Bench, 1 Vol., 2 Ed. of 1847. At page 1112, will be found the following :

(1) 3 Ellis & Blackburn's Rep. in Q. B. and Exchequer, p. 724.

" And if the plaintiff fail to prove such notice at the trial, the Justice shall recover a verdict and costs, and the plaintiff shall not give evidence of any cause of action except that mentioned in the notice." At page 1116 of the same work it is stated: " The plaintiff is bound by the statutes above mentioned to prove at the trial the service of the notice, otherwise the defendant shall be entitled to a verdict, and he is restricted in his proof by this notice in the same manner as he is by a bill of particulars."

IRVINE, *Contra*.

Upon this motion the Court reserved to Hough, the defendant, the right to move, upon the grounds above stated, for a non-suit after verdict.

The plaintiff then continued to proceed with his evidence, and upon his attempting to adduce evidence as to an arrest and imprisonment anterior to the twentieth of December, the day stated in the notice of action, the defendant objected, and the objection was recorded and reserved.

The plaintiff having proved that he was arrested on the twentieth, that the respondent had been sworn in as a constable, and the other facts connected with the arrest, the following motion was made on behalf of the defendant.

" Motion, without prejudice to the motion already made
 " in this cause, that inasmuch as the defendant acted as a
 " constable on the twentieth day of December last, inasmuch
 " also as the acts complained of in and by the plaintiff's
 " declaration, are alleged to have taken place on the same
 " day, inasmuch also as it is proved that the acts com-
 " plained of were performed on the same day, inasmuch
 " also as no malice on the part of the defendant is proved,
 " inasmuch also as it has been proved that he acted with
 " reasonable or probable cause and that the question of
 " malice and reasonable cause is a question of law for this
 " Court to determine, it be declared that no cause of action

"against the defendant exists, and that he be subject to a non-suit."

After the argument upon this motion the Court again reserved to the respondent, the right of moving for a non-suit on the ground therein stated.

At this stage of the case a motion was made on the part of the plaintiff as follows:—

"Motion on the part of the plaintiff for *acte* of his declaration, that he restricts and limits his demand in the present action to damages for the wrongful arrest of the plaintiff and his detention up to the time of the alleged swearing in of the defendant as a constable before Judge Maguire, in December last."

The plaintiff was allowed to file the above declaration, and no judgment was pronounced upon it.

The case then went to the jury when the following verdict was rendered upon the questions submitted to them:—

"To the first question: The defendant did arrest and imprison the plaintiff at the town of Levis, in the month of December last.—To the second question: The Honorable James Smith had, at that time, issued his warrant for the arrest of certain persons, to wit, Samuel Lackey, Squire Turner Teavis, Alexander Pope Bruce, Charles Moore Swager, George Scott, Bennett H. Young, Caleb McDowall Wallace, James Alexander Doty, Joseph McGrorty, Samuel Simpson Gregg, Dudley Moore, Thomas Bronsden Collins, Marcus Spurr and William H. Hutchinson, and a proclamation had been duly issued offering a reward for the apprehension of the persons mentioned in the warrant of the said James Smith.—To the third question: The said warrant was not put into the hands of the said defendant as a constable or

" peace officer to be executed. To the 4th question. The defendant did arrest and detain the plaintiff without a warrant, and without a reasonable and probable cause.— To the 5th question The plaintiff did suffer damage from his arrest and detention by the defendant and to the extent of five hundred dollars."

At the ensuing term of May the plaintiff moved for judgment pursuant to verdict, and the defendant moved, at the same time, that a non. suit be entered, and the plaintiff's action dismissed.

For the defendant, the argument submitted on the foregoing motions on his behalf was again stated, and the additional fact that the Jury had found, viz.: that the Queen's proclamation had issued for the arrest of the persons named in Judge Smith's warrant, was relied upon as an additional justification for the arrest. The language to be found in Blackstone's Commentaries on this head is as follows: "These proclamations have then a binding force, when, as Sir Edward Coke observes, they are grounded upon and enforce the laws of the realm."

IRVINE, for plaintiff:—The questions to be decided by the Court resolve themselves into the following:—

1° Was the plaintiff bound by law to give to the defendant notice of the present action.

2° If he were bound to do so, was the notice, which it is proved was given to the defendant, sufficient.

3° Does the error as to the date of the arrest prevent the plaintiff from recovering.

First then with regard to the necessity for any notice of action. The consolidated statute for Lower Canada, cap. 101, section 1, enacts that "No writ shall be sued out against any Justice of the Peace or other officer or person

fulfilling any public duty, for anything by him done in the performance of such public duty, whether such duty arises out of the common Law or is imposed by Act of Parliament, either Imperial or Provincial, nor shall any Judgment or verdict be rendered against him unless notice in writing of such intended writ, specifying the cause of action with reasonable clearness, has been delivered to such Justice, officer or other person, or left at the usual place of his abode by the attorney or agent of the party who intends to sue out such writ, at least one month before suing out such writ." The Jury have only found in this case an arrest and detention of the plaintiff at Levis, the subsequent treatment of him by the defendant, the bringing of him to Quebec and the detention in the defendant's house is altogether ignored ; when the defendant made the arrest at Levis it was on the 19th of December, he then held no Warrant for the arrest of any one, he was not a constable and he was discharging no public duty, he was simply going on his own responsibility to arrest certain accused persons for the sake of obtaining a reward. It cannot be pretended that he was one of the persons intended to be protected by the Statute, that law was intended to apply to persons holding offices which compel them to discharge certain duties, and who commit errors in the *bona fide* discharge of duties which their office makes obligatory on them. The learned counsel argued that because a proclamation had been issued offering a reward for the apprehension of the persons against whom Judge Smith's Warrant had issued it became the public duty of all her Majesty's subjects to endeavour to arrest the accused, but such a proposition is too unreasonable to require an answer, and moreover the proclamation only calls upon the public to give information which will lead to the arrest of the raiders, and does not require private citizens to leave their own business to go in pursuit of them. The responsibility which the defendant incurred is well explained in the authorities. " If a private person apprehend another on

"suspicion of felony he does it at his peril," and reasonable and probable cause will not justify a private person as it may in certain cases justify a constable, but can only be urged in mitigation of damages. (1) "A strong personal resemblance between the plaintiff and the culprit is no justification to this action when the arrest is made by a private person." (2)

It is again urged that the declaration alleges that a notice was given and that the action was based on the notice; it is quite true that a notice of the action was given and that the fact is alleged, but if the giving of the notice was unnecessary, on what principle can it be contended that the giving of a notice, which would be insufficient in a case where a notice was necessary, is fatal to an action for which no notice whatever is required.

2nd.—I submit that the notice of action which actually was given is sufficient to meet the requirements of the Statute, if it were shown that the defendant was entitled to such notice. The form used was copied from Bagley's Practice, p. 68, form No. 8, and appears to have been in use in England, until it was held to be insufficient by the decision of the Court of Queen's Bench in the case of *Martins vs. Upcher*, 3 Adolphus and Ellis, p. 662. The words of the English Statute 24 Geo. II, cap. 44, sec. 1., require that "the cause of action should be clearly and explicitly contained in the notice," the Canadian Statute cited above, requires that the notice should specify the cause of action with reasonable clearness;" It is evident that the words of our Statute are not so strict as those of the English Act; and the Courts have not been in the habit of exacting the same strictness as that required in the case of *Martins vs. Upcher*, see the opinions, Ch. J. Lafontaine and Duval, J., in the case of *Talbot and Mon-*

(1) 3 Stephen's Nisi prius, p. 2029 :—Addison on Wrongs, p. 402.

(2) *Rayner vs. Garman*, 1 Foster and Finlayson's Nisi prius, p. 790.

tizambert, 10 L. C. Reports, p. 272, in which it was held that a Notarial protest was sufficient notice of action to a public officer sued for damages occasioned by an omission in the performance of a public duty.

3rd.—The last objection raised by the learned counsel is founded in an error as to the date of the arrest complained of; the declaration alleges that the defendant arrested the plaintiff at Levis on the 20th December, whilst the evidence shews the arrest to have been on the 19th of that month. In cases of this kind an error as to date has never been considered material; for English authorities on the subject the court is referred particularly to Addison on Wrongs, p. 425; *Chesley vs Barnes*, 10 East, p. 80. The pleadings shew that the defendant was not lead astray by this error, for he alleges in his plea that the arrest took place on the 19th and that the arrest on that day is the same as that complained of in the declaration. This allegation would cover the error if it were material. But the defendant argues: it is true that you intended to complain of and have proved an arrest on the 19th December, and that is the arrest which I have justified in my plea, but you have charged me with acts done on the 20th December, and on that day I was a duly appointed constable for the District of Quebec, and because of the error in your declaration, I can make use of my legal position, subsequently acquired, to justify my proceedings of the day before. Such an argument if founded on fact would not be of any avail. If the error as to the day is material then of course the action must fail, if on the other hand it is indifferent, then we have nothing to do with what took place on the 20th. But in truth Mr. Hough never was a constable, Mr. Maguire, in his evidence, says that after the arrest he swore in the defendant as a special constable but there was no oath in writing and no record was made of the appointment. The manner of appointing constables is provided for in Con. Stat. for L. C., cap., 100, sec. 3, and from

this it appears that no official character was at any time conferred on the defendant.

STUART Justice :—In the last term of the Superior Court a motion for judgment was made in this suit for judgment pursuant to a verdict of the jury for \$500 damages, rendered in the previous vacation, while, on the other hand, a motion was made for a non-suit upon points reserved at the trial. The action is brought against the defendant for acting and pretending to act as a constable on the 20th day of December last, and for having, as such, arrested the defendant on that day, and imprisoned him then and some days following. The declaration states that notice of the action had been given according to the statute in such case made and provided. The notice of action required by the Provincial statute is, substantially, the same as that required by a statute in England. It is not sufficient that the day alone, when the arrest and imprisonment took place, be stated in the notice, but the place where, which has been omitted. It is more necessary here than it is in England where the cause of action attaches to the person of the defendant who can be sued any where. In this country the jurisdiction of the Court does not extend beyond the district in which the injury sustained was committed. In this case an arrest and imprisonment appear to have been made on the 19th December and the following days, partly in the district of Quebec and partly in the district of Montreal. Our statute enacts that the action must be in the place where the injury complained of was committed. Although in ordinary cases the date is not material it is so in this, because on the 19th the defendant was not a constable at the time of the first arrest. The notice of action is for the 20th, when he had been sworn in as a constable, and in the declaration he is charged with having acted as a constable on the 20th. But the counsel for the plaintiff ingeniously say that they will drop the 20th and go upon the 19th, as the arrest extended from

that to the following days. But this cannot be; they say that the arrest was as a constable on the 20th, and they have given their notice for that and the following days. The place therefore should have been stated, and it was so held in the case of *Martins vs. Upsher*, Ad. & El. reports Q. B R., p. 262, viz: That the notice must specify the place at which the act complained of occurred, and in rendering his judgment on the point, Lord DENMAN said, "The language of the act requires that the causes of action shall be clearly and explicitly contained in the notice, and unless *time* and *place* be stated the cause is not clearly and explicitly stated. Lord ABINGER, C. B., in *Bennet vs. Broughton*, appears to have thought both "necessary."

I am therefore compelled to grant the defendant's motion for a non-suit.—Action dismissed with costs. (1)

HOLT & IRVINE, for plaintiff.

STUART & MURPHY, for defendant.

BANC DE LA REINE, } DISTRICT DE MONTREAL.
EN APPEL.

Présents :—DUVAL, Juge-en-Chef, AYLWIN, DRUMMOND
et MONDELET, Juges.

FOLEY, *et al.*.....:..... *Appellants.*
et

FORRESTER, *et al.*..... *Intimés.*

Jugé :—Que sur poursuite fondée sur un billet promissaire contre des associés, en défaut de plaider, jugement peut être rendu sans qu'il soit nécessaire de faire aucune preuve.

Held :—That upon action brought upon a promissory note against co-partners, who have failed to put in a plea, judgment may be rendered without its being necessary to go to proof.

Jugement rendu le 8 mars, 1866.

L'action en Cour de première instance était portée par Forrester et Cie., contre les défendeurs Foley et Cross,

(1) Confirmed in appeal at Quebec the 20th June 1866.

comme faiseurs d'un billet, et contre Wm. Stuart, endosseur. Les défendeurs, après avoir comparus par procureurs, furent forclos de plaider. Là-dessus les demandeurs inscrivirent la cause pour jugement, en se prévalant des dispositions du chapitre 83 des Statuts Refondus pour le Bas-Canada, section 86, sans faire aucune preuve.

Le 30 septembre, 1864, le jugement suivant fut rendu :

BERTHELOT, Juge :—The Court having heard the plaintiffs *ex parte*, &c., it is considered and adjudged that the plaintiffs do recover from the defendants, jointly and severally, the sum of five thousand two hundred and twenty-eight dollars and twenty-three cents, current money of this Province of Canada, due as follows, to wit: the sum of five thousand two hundred and twenty-five dollars and twenty-five cents, amount of the Promissory Note, dated Montreal, eleventh December, one thousand eight hundred and sixty-three, made by James Foley and Thomas Cross, to wit, two of the said defendants, by their co-partnership signature of Foley & Co., payable three months after the date thereof to W. W. Stuart, to wit, the said William W. Stuart, the other defendant, at the Bank of Montreal, in Montreal, for value received, and by the said William W. Stuart endorsed and delivered to the said plaintiffs, and two dollars and fifty cents for the costs of the protest of the said Note with interest, &c.

Les défendeurs Foley et Cross interjetèrent appel de ce jugement, prétendant que la section du Statut en question dispensait seulement de la preuve de la signature du billet, mais non de la preuve de la société ou de tout autre fait articulé dans la demande. Cette prétention n'a pas été accueillie par la Cour d'Appel, qui, " considérant qu'il n'y avait pas erreur dans le jugement dont est appel, " l'a confirmé.

ROBERTSON, A. et W., pour les appelants.

CROSS et LUNN, pour les intimés.

BANC DE LA REINE, } DISTRICT DE MONTREAL.
EN APPEL.

Présents :—DUVAL, Juge-en-Chef, AYLWIN, MEREDITH,
DRUMMOND et MONDELET, Juges.

LA COMPAGNIE DU CHEMIN DE FER DE MONT-
REAL ET CHAMPLAIN..... *Appelante.*
et
PERRAS..... *Intimé.*

Jugé :—Qu'après le 1er de décembre, lorsque les clôtures sont abattues sur les terres avoisinant le chemin de fer, la Compagnie ne peut être tenue responsable de la perte des animaux qui peuvent être tués sur son terrain.

Held :—That after the first of December, when the fences upon lands adjoining the railway are taken down, the Company cannot be held responsible for the loss of cattle that may be killed upon its grounds.

Jugement rendu le 8 mars, 1866.

Le ou vers le 16 décembre, 1862, deux chevaux, appartenant à l'intimé, furent trouvés morts sur le terrain de l'appelante et le long du chemin de fer. Présument qu'ils avaient été tués par la locomotive, l'intimé poursuivit la compagnie, appelante, pour le recouvrement de £30, valeur des deux chevaux, alléguant que cette perte avait été causée par la faute et l'incurie des employés de la Compagnie, et par le mauvais état de ses clôtures, qu'elle avait fait abattre quelque temps auparavant, *le long de la terre* du demandeur, en sorte qu'elle était responsable des dommages ainsi soufferts par l'intimé.

La Compagnie opposa à cette demande deux exceptions, par lesquelles elle alléguait que la terre du demandeur faisait partie d'une étendue de terre appartenant à plusieurs personnes, sans que les parts individuelles fussent divisées par des clôtures de séparation; que ces terrains s'étendaient l'espace de près d'un mille le long du chemin de la Compagnie; que la terre du demandeur était bornée à chaque extrémité par un chemin public, et que, par la loi, toutes les clôtures le long des chemins publics doivent être abattues, à compter du premier jour de décembre, chaque année, ainsi que les clôtures de ligne jusqu'à la

distance de vingt-cinq pieds à partir du chemin public, afin d'éviter l'amoncellement des neiges dans les chemins; que la Compagnie, avec l'acquiescement du demandeur, avait, depuis quelques années, l'habitude d'abattre également ses clôtures vers la même époque, et que le demandeur lui-même enlevait les barrières qui donnaient sur le chemin de la Compagnie, et qu'elle n'avait jamais été mise en demeure d'en agir autrement; que l'entretien de sa clôture eût été inutile et qu'elle n'y était aucunement tenue; qu'en conséquence elle ne pouvait être tenue des dommages qui pouvaient en résulter.

Pour établir l'obligation de la Compagnie de veiller à l'entretien des clôtures, le demandeur s'appuyait sur l'acte des chemins de fer. (1)

La Cour de Circuit, à Montréal, rendit le 30 mars, 1864, le jugement suivant :

LORANGER, Juge :—" La Cour, etc.—Considérant qu'il appert par la preuve qu'une jument et un poulain appartenant au demandeur, la jument et le poulain mentionnés au libellé de la demande, étant de la valeur de trente louis, dix-sept livres et dix chelins étant la valeur de la jument et douze livres et dix chelins celle du poulain, ont été, le seize décembre, mil huit cent soixante-et-deux, tués par un engin de la Compagnie, sur la voie ferrée conduisant de St. Lambert à Rouse's Point, et qui est la propriété de la Compagnie : Considérant que la dite jument et le dit poulain se trouvaient ainsi sur la voie ferrée, où ils étaient errants, par la faute de la dite Compagnie qui, quelques jours auparavant, avait, mal à propos, fait abattre les clôtures qui, de chaque côté de la dite voie ferrée, séparent la terre du demandeur, sur laquelle les dits animaux avaient été mis par le demandeur, et que, partant, la Compagnie défenderesse, est responsable de la perte des dits animaux, perte qui a occasionné au demandeur des dommages égaux

(1) Ch. 46, Statuts Révisés, B.-C., sects. 13, 15, 16.

à leur valeur, c'est-à-dire au montant de la somme de trente livres, qu'il réclame : Considérant que la Compagnie n'a justifié d'aucun des faits mentionnés en l'exception péremptoire par elle produite, et qui soient de nature à faire repousser l'action du demandeur, a débouté et déboute la dite exception ; et, faisant droit sur la demande, condamne la Compagnie défenderesse, à payer au dit demandeur la dite somme de trente livres à titre de dommages et intérêts comme compensation de la perte des dits animaux, avec intérêt du neuf février, mil huit cent soixante-et-trois, date de l'assignation, et les dépens. ”

Ce jugement fut infirmé par la Cour d'Appel, qui prononça comme suit :

“ Considérant que l'intimé, demandeur en Cour de première instance, de concert avec plusieurs de ses voisins dont les terres et héritages aboutissent au chemin de fer de la dite Compagnie, avait, dès avant l'accident arrivé aux chevaux du dit demandeur en Cour de première instance, abattu et défait ses barrières et clôtures, ce qui permettait aux animaux, tant les siens que ceux de ses voisins, d'entrer sur le dit chemin de fer, et que si quelques-uns des animaux du dit demandeur en Cour de première instance, ont été tués par la locomotive de l'appelante, la cause en peut être attribuée à la négligence et au fait du dit intimé et de ses voisins : Considérant en conséquence qu'il y a erreur dans le jugement de la Cour de première instance, par lequel l'action de l'intimé aurait dû être déboutée, cette Cour casse, annule et met au néant le dit jugement rendu à Montréal, par la Cour de Circuit, le 80 de mars, 1864 ; et procédant à rendre le jugement qu'aurait dû rendre la dite Cour de première instance, déboute l'action de l'intimé qu'elle condamne à tous les dépens. —
 DRUMMOND, Juge, *dissentiente*.

CARTIER, POMINVILLE et BETOURNAY, pour l'appelante.

MOREAU, OUMET et CHAPLEAU, pour l'intimé.

QUEEN'S BENCH, } DISTRICT OF MONTREAL.
 APPEAL SIDE.

Before :—DUVAL, Chief-Justice, AYLWIN, MEREDITH,
 DRUMMOND and MONDELET, Justices.

CRÉBASSA, *Appellant*,
 and
 MASSUE, *Respondent*.

Held :—1o. That it is not necessary that a judgment upon demand for a *contrainte par corps* for opposing the execution of a writ should recite *verbatim* the terms of the motion or rule.

2o. That the return of the sheriff alone, is sufficient evidence to authorise the Court to adjudicate upon such demand, the defendant having failed to appear.

3o. That upon such judgment, the imprisonment ought to take place in the district where the defendant resides.

Jugé :—1o. Qu'il n'est pas nécessaire qu'un jugement sur demande de *contrainte par corps*, pour rébellion à justice, reproduise *verbatim* les termes de la motion ou règle.

2o. Que le rapport du shérif seul, est une preuve suffisante pour autoriser le tribunal à prononcer sur telle demande, le défendeur n'ayant pas comparu.

3o. Que sur tel jugement, l'incarcération devait avoir lieu dans le district où résidait le défendeur.

Judgment rendered the 8th March, 1866.

Pursuant to notice given, the respondent, plaintiff in the Court below, moved as follows :

Motion :—On behalf of the said plaintiff that inasmuch as it appears by the return of Pierre Rémi Chevallier, Esquire, sheriff of the district of Richelieu, to the writ of *Pluries Venditioni Exponas de bonis* in this cause issued from this Honorable Court, on the 31st day of March last past, against the goods and chattels of the said defendant, that on the 28th day of April last past, at the hour of ten of the clock in the forenoon, the said sheriff then and there charged with the execution of the said writ, proceeded to the domicile of the said defendant, in the town of Sorel, in the district of Richelieu, according to law, to put in execution the said writ, and to sell and dispose of, by virtue of the said writ, the goods and chattels of the said defendant, where being and finding the doors of the said domicile locked, in order to prevent admission thereto, he, the said sheriff, demanded of the said defendant to open the doors of the said domicile, and to permit him the said

sheriff to enter therein in order to proceed to and effect the sale of the said goods and chattels duly seized and taken in execution, but could not proceed to nor effect the sale of the same, and was prevented and stopped from so doing, and was then and there opposed from so doing by the said defendant himself in person, who then and there opposed the sale thereof by shutting up his house and refusing admittance thereto to the said sheriff, and then and there positively refused to open his doors, and then and there persisted in his said refusal, although repeatedly requested and ordered so to do, as the whole more fully appears by the said return; an execution do go against the person of the said defendant, and *contrainte par corps* do issue directed to the sheriff of the district of Richelieu against the person of the said defendant to be taken and him detained in prison, to wit: in the common gaol of the district of Richelieu, until the said defendant shall have satisfied the judgment in this cause rendered, in principal, interest and costs, and subsequent costs, and also the costs of these presents; unless cause to the contrary be by him shown on the 27th day of May instant, at half past ten of the clock in the forenoon, sitting the Court.

The motion having been granted on the 20th May, a rule *nisi* was served upon the defendant, on the 21st May at Sorel, a distance of 45 miles from Montreal, returnable on the 27th May.

The rule having been returned the defendant did not appear.

The respondent prayed that the rule be made absolute, and relied on the Consolidated Statute for Lower Canada, chapter 88, sections 143 and 144, and also on section 141 with respect to the common gaol, where the defendant was to be imprisoned, it being the prison of the district where the party resides, and not the district from whence the writ of *contrainte par corps* or *capias ad satisfaciendum* issues.

Judgment was rendered on the 31st May, 1864, as follows :

“ The Court having heard the plaintiff by his counsel upon the rule for *contrainte par corps*, obtained by him against the said defendant and opposant, on the twentieth day of May instant, the defendant being in default to appear and answer the said rule ; and also, having heard William H. Kerr, Esquire, as *amicus curiæ*, against granting the said rule, having examined the proceedings taken upon the said rule, and had in this cause for the purpose of executing the judgment obtained by the said plaintiff against the said defendant, on the eighteenth day of February, one thousand eight hundred and sixty-three, and having seen and examined the rule for *contrainte par corps*, and having maturely deliberated, considering that it appears by the return of Pierre-Rémi Chevallier, Esquire, sheriff of the district of Richelieu, to the writ of *Pluries Venditioni Exponas de bonis* in this cause, issued from this Court, on the thirty-first day of March last past, against the goods and chattels of the said defendant, that on the twenty-eighth day of April last, at the hour of ten of the clock of the forenoon, the said sheriff, then and there charged with the execution of the said writ, proceeded to the domicile of the said defendant, in the town of Sorel, in the district of Richelieu, according to law, to put in execution the said writ, and to sell and dispose of, by virtue of the said writ, the goods and chattels of the said defendant, where being and finding the doors of the said domicile locked, in order to prevent admission thereto, he, the said sheriff demanded of the said defendant to open the doors of the said domicile, and to permit him, the said sheriff, to enter therein, in order to proceed to and effect the sale of the said goods and chattels duly seized and taken in execution, but could not proceed to nor effect the sale of the same, and was prevented and stopped from so doing, and was then and there opposed from so doing by the said defen-

dant himself in person, who then and there opposed the sale thereof by shutting up his house and refusing admittance thereto to the said sheriff, and then and there positively refused to open his doors, and then and there persisted in his said refusal, although repeatedly requested and ordered so to do: And the Court considering that it is clearly established by the proceedings in this cause that the said defendant hath persistently and constantly resisted the process of this Court, and hath by frivolous and vexatious oppositions retarded and prevented the execution of the judgment obtained against him by the said plaintiff on the eighteenth day of February, one thousand eight hundred and sixty-three, and that the said defendant hath made default to appear and disprove the facts, *rèbellion en justice*, made against him, or to show cause why the conclusion of the said rule should not be granted ;

“ The Court doth declare the said rule absolute, and doth order that an execution do go against the person of the said defendant, and that a *contrainte par corps* do issue directed to the sheriff of the district of Richelieu against the person of the said defendant, commanding the said sheriff to take and arrest the body of the said defendant, within his district, and him to detain in prison, in the common gaol of the district of Richelieu, until he, the said defendant, shall have satisfied the said judgment in this cause rendered on the said eighteenth day of February, one thousand eight hundred and sixty-three, in principal, interest and costs and also subsequent costs, together with the costs of the said rule, for *contrainte par corps*, that is to say : that he shall pay and satisfy to the said plaintiff the sum of five hundred and two dollars and five cents current money of this Province of Canada, amount in principal of the said judgment, with interest upon the sum of five hundred dollars, from the thirteenth day of May, one thousand eight hundred and sixty-two, and on the sum of two dollars and five cents from the twenty-seventh

day of June, one thousand eight hundred and sixty-two, and until he pay the further sum of eighty-five dollars and thirty-two cents, said currency, costs taxed upon the said judgment of the said eighteenth day of February, one thousand eight hundred and sixty-three, and the further sum of one hundred and fifteen dollars and thirty cents, said currency, costs taxed against him upon the orders of the twenty-fifth day of June, one thousand eight hundred and sixty-three and the twenty-ninth day of September, one thousand eight hundred and sixty-three, dismissing two oppositions; the further sum of twenty-nine dollars and forty-seven cents, said currency, being the costs accrued upon the following writs issued in this cause, to wit: A writ of *Fieri Facias de bonis*, a writ of *alias Fieri Facias de bonis*, a writ of *Venditioni Exponas de bonis*. The further sum of five dollars and ninety-two cents, being the amount of costs taxed upon the rule of the twenty-third day of November, one thousand eight hundred and sixty-three, dismissing a third opposition made in this cause. The further sum of ten dollars and sixty-five cents, currency, being the amount of costs accrued upon two writs issued in this cause, the one, a writ of *Pluries Venditioni Exponas de bonis*, dated the sixteenth day of October, one thousand eight hundred and sixty-three, and the other, a writ of *alias Pluries Venditioni Exponas de bonis*, dated the fourteenth day of December, one thousand eight hundred and sixty-three, the further sum of thirteen dollars and fifty-five cents for the costs accrued upon a writ of *Pluries Venditioni Exponas de bonis*, issued in this cause, dated the thirty-first day of March, one thousand eight hundred and sixty-four, and subsequent costs accrued upon the writ of *alias Pluries Venditioni Exponas de bonis*, and the sum of ten dollars and five cents for the costs taxed upon the rule for *contrainte par corps*."

From this judgment the defendant instituted his appeal, and urged against it the following reasons:

1° Parce que la motion du dit intimé demandant la dite contrainte par corps diffère de cette dernière.

2° Parce que la dite motion ne spécifie pas les sommes et deniers que le dit appelant aurait à payer pour se soustraire à la contrainte par corps.

3° Parce que le délai entre la *règle* et le jour fixé pour son rapport est insuffisant.

4° Parce que le dit jugement a été rendu sans aucune preuve valable prescrite par la loi.

5° Parce que la dite contrainte par corps n'est pas adressée à tout shérif de tout district où le dit défendeur pourrait être trouvé,

6° Parce que le dit jugement n'ordonne pas que le dit défendeur soit emprisonné en la prison commune du district où il sera arrêté.

7° Parce que la *règle* pour la dite contrainte par corps n'a pas été signifiée par un officier compétent.

8° Parce que la motion pour la dite règle n'a pas été également signifiée par un officier compétent.

9° Parce que les procédés du dit shérif sont irréguliers et illégaux.

The respondent contended that the *Edit d'Amboise sur la rébellion à justice*, of 1572, art. 4, and the ordinance of 1667, tit. 19, arts. 16 and 17, tit. 88, art. 5, and tit. 27, art. 7, were superseded by the statutory enactments contained in chap. 88 of the Cons. Stats. for Lower Canada, secs. 143, 144 and 145; and that the *voie extraordinaire* under the ordinance of 1670, title 10, art. 6, could not be put in force in this country; that the proceedings adopted in France, which were taken as well from the old French criminal procedure as from the municipal law, could not be

followed in Lower Canada, 1 Jousse, ord. 1667, p. 248; that the return of the sheriff, a public officer recognized by law, is not in such cases as the present one, *traversable*, but the party is driven to his action against him for a false return. (1)

The Court of Appeals considering that there was no error in the judgment appealed from, affirmed it with costs.

GIROUARD, D., for appellant.

LA FRENAYE & ARMSTONG, for respondent.

BANC DE LA REINE, } DISTRICT DE MONTREAL.
EN APPEL.

Présents :—DUVAL, Juge-en-Chef, AYLWIN, MEREDITH,
DRUMMOND et MONDELET, Juges.

WOODMAN, *et al* *Appellants.*
et
GÉNIER *Intimé.*

Jugé :—Que le fait que l'un de plusieurs appelants a payé partie des frais taxés sur le jugement dont est appel, ne peut faire présumer acquiescement de sa part, quoiqu'il n'ait fait aucune réserve ou protestation lors de tel paiement.

Held :—That the fact of one of several appellants having paid part of the taxed costs upon the judgment appealed from, does not raise a presumption of acquiescement on his part, although he has made no reserve or protestation at the time of payment.

Jugement rendu le 9 juin, 1866.

L'appel en la cause tendait à faire reviser un jugement rendu à Beauharnois, déclarant nul un décret d'immeuble fait à la poursuite de Woodman, par le ministère de Hainault, comme shérif, et ordonnant que Génier fut remis en possession de cet immeuble et remettant les parties au même état qu'elles étaient avant l'adjudication, le rapport du shérif de telle adjudication étant déclaré faux,

(1) Bacon's Abridgment, vbo. Rescous, letter E, 3.

ⁿ The respondent cited : 4 Burr., p. 2129, Rex vs. Elkins :—Barnes, 149 :—3 Starkie, p. 1357 :—11 East, 297 :—2 Salk, p. 586 :—3 Bulst, 201 :—Dyer, 212 :—2 Jones, 39 :—1 Ventris, 224 :—2 Ventris, 175 :—Comb, 295 :—5 L. C. Reports, p. 168.

l'adjudication n'ayant pas été faite au plus haut et dernier enchérisseur, mais à Woodman et Bard P. Paige, tandis que Génier avait offert une somme bien plus élevée.

Génier, l'intimé, par une exception préliminaire demanda le renvoi de l'appel, en autant que les appelants avaient acquiescé au jugement en question, l'avaient acceptée, s'y étaient soumis, l'avaient approuvé et exécuté. Il fondait cet acquiescement : 1° Sur le fait que l'appelant Hainault avait payé les frais de l'intimé sans aucune réserve ou protestation ; 2° sur le fait que, sur une action portée par l'intimé contre Woodman et Hainault dans le but de recouvrer des dommages à lui causés par les faits reprochés aux demandeurs en la cause, les deux appelants avaient plaidé à cette deuxième action sans protestation contre le dit jugement, sauf toutefois le dit Hainault qui avait mis une réserve, réserve que l'intimé disait que l'appelant Hainault ne pouvait faire, ayant lui-même payé les frais de la première action sans protestation ni réserve.

Les appelants répondirent à cette exception par une même réponse, que Hainault avait payé les frais sans la connaissance ou la participation des autres appelants ; que l'omission de réserve ou protestation contre le jugement, dont était appel, dans leur défense à la seconde action ne pouvait être interprétée comme un acquiescement à l'autre jugement de la part de Woodman, et que Bard P. Paige, un autre des appelants, n'avait en aucune manière quelconque acquiescé au dit jugement.

Il ne pouvait y avoir de question que relativement à Hainault qui, dans l'exception plaidée par lui à la seconde action, demandait " acte de la déclaration qu'il fait qu'il entend se pourvoir par appel contre le dit jugement final."

La Cour s'est prononcé néanmoins en sa faveur, et par son jugement a déclaré " que les faits constatés par la preuve offerte ne justifient aucunement la prétention de

l'intimé que les appelants ont acquiescé au jugement dont est appel."

DOUTRE et DOUTRE, pour l'intimé.

LEBLANC et CASSIDY, pour les appelants.

BANC DE LA REINE, } DISTRICT DE MONTREAL.
EN APPEL.

Présents :—DUVAL, Juge-en-Chef, MEREDITH, DRUMMOND
et MONDELET, Juges.

DEBEAUJEU *Appelant.*
et
DESCHAMPS *Intimé.*

Jugé :—Que, dans l'espèce, sur un acte de la nature d'une transaction, à raison d'un recours hypothécaire après discussion du débiteur, il faut discussion de tous les biens, meubles et immeubles de ce débiteur, avant de pouvoir exercer recours contre les tiers détenteurs.

Held :—That, in the case submitted, upon a deed in the nature of a transaction, by reason of an hypothecary claim after discussion, there must be discussion of all the estate, movable and immovable of the debtor, before recourse can be had against the *tiers détenteurs*.

Jugement rendu le 9 juin, 1866.

L'action intentée était fondée sur un acte notarié en date du 26 de décembre, 1839, intitulé *acte de transaction*, par lequel le défendeur, intimé, avec plusieurs autres, reconnurent que leurs immeubles respectifs étaient hypothéqués au paiement de certaines obligations consenties par un nommé Antoine Filion, en faveur de Jacques-Philippe Saveuse DeBeaujeu, père, le 31 janvier, 1821, et le 24 septembre, 1829, et par lequel il fut convenu entr'eux et la dame DeBeaujeu, veuve du dit créancier, qu'après qu'elle aurait fait discuter les biens de Filion, les comparants paieraient chacun un onzième de la balance, déduction faite d'un quart, avec intérêt, et ce en quatre paiements annuels dont le premier se ferait trois mois après la discussion.

La veuve DeBeaujeu étant décédée, la créance sus mentionnée échut pour moitié par succession au demandeur, l'appelant, qui alléguait, dans sa déclaration, les différents actes ci-dessus et leur enregistrement, la possession par le défendeur de l'immeuble désigné en l'acte du 26 de décembre, 1839, la discussion de Filion qui était décédé insolvable, et établissant une balance de £1,355 12s. 2d. en sa faveur, il demandait que l'immeuble du défendeur fût déclaré hypothéqué pour cette balance, et que le défendeur fût condamné personnellement au paiement de £474 3s. 6d. pour sa part en principal et intérêt suivant l'acte de transaction.

A cette demande le défendeur plaida :

Erreur dans l'acte de prétendue transaction, en autant qu'à l'époque de sa passation, l'hypothèque résultant de l'acte du 31 janvier, 1821, était prescrite, le défendeur ayant acquis l'immeuble de Filion, en 1826, et l'ayant depuis lors possédé sans trouble pendant plus de dix ans; que de plus, le demandeur avait accepté en paiement la balance du prix de vente (\$800); que l'acte du 23 septembre, 1829, ne pouvait affecter l'immeuble vendu par Filion en 1826; et que le défendeur n'avait signé l'acte que sur les représentations fausses et frauduleuses du demandeur.

Cet acte de transaction porte que "*les susdits propriétaires des susdites terres désirant éviter les frais d'une poursuite en déclaration d'hypothèque que la dite dame veuve DeBeaujeu pourrait faire contre eux, ils consentent et s'obligent que lorsque la dite veuve aura fait discuter les biens du dit sieur Filion, père, pour tout ce qui lui est dû, tant en vertu de la dite obligation qu'autrement, s'il reste une balance après la dite discussion faite, eux, les détenteurs des terrains hypothéqués, paieront à la dite Dame de Beaujeu chacun un onzième de cette balance avec intérêt légal, le tout sans novation du droit d'hypothèque que la dite dame*

veuve DeBeaujeu a sur les susdites terres en vertu de la dite obligation," (savoir celle du 31 janvier, 1821.)

Des témoins établirent que l'acte avait été signé sous le prétexte que cela était nécessaire pour faire payer Filion, et sous la menace de poursuite.

Sur cette question de dol et de nullité de la reconnaissance, l'intimé invoquait les autorités citées aux notes. (1)

Le défendeur invoqua, de plus, le défaut de discussion de Filion. La preuve du demandeur, sur ce point, consistait dans la production de trois brefs d'exécution contre les meubles de Filion. Le premier, en date du 28 décembre, 1839, avec un rapport du shérif qu'il avait prélevé £32 10 10 $\frac{1}{2}$ par la vente de partie des meubles de Filion, le reste n'ayant pas été vendu, au désir de la demanderesse. Le second, émané le 8 avril, 1842, avec rapport du shérif qu'il avait prélevé £5 17 10 par la vente de certains meubles de Filion, que certains animaux n'avaient pas été vendus par suite d'opposition, et que d'autres effets ne l'avaient pas été faute d'enchérisseurs. Au troisième bref, en date du 6 octobre, 1848, le shérif fait rapport qu'il n'avait trouvé dans le district aucuns meubles appartenant à Filion.

L'appelant soutenait les propositions suivantes :

1° L'obligation du 31 janvier, 1821, consentie par feu Antoine Filion constitue une hypothèque sur la propriété de l'intimé.

Quant au dol : 1 Domat, liv. 1, tit. 18, sec. 3, no. 1 :—Troplong, Prescription, nos. 54, 55 :—Code de la Louisiane, art. 1841, § 4, 5, 6, 10, art. 1842 :—1 Chardon, Dol, nos. 91, 92, 93, à 99 et 100 :—Anc. Denisart, vbo. Rescindant, no. 9 :—1 Bedarride, Fraude, nos. 9, 10, 11 :—Pothier, Obl., no. 799 :—Solon, Nullités, nos. 266, 267 :—7 L. C. Jurist, p. 85.

Défaut de cause : 2 Bourjon, p. 565 :—21 Duranton, nos. 89, 90 :—1 Domat, liv. 1, tit. 1, sec. 3, no. 13 :—Anc. Den., vbo. Rescindant, no. 10 :—1 Despeisses, p. 761 :—8 Duranton, nos. 546-7.

Sur l'erreur : Domat, liv. 1, tit. 1, sec. 5, no. 10 ; tit. 18, sec. 1, nos. 7, 9, 11 ; sec. 2 :—Troplong, Prescription, nos. 30, 33, 65, 75 :—1 Solon, Nullités, nos. 192, 197 :—Dunod, Prescription, p. 110 :—6 Toullier, nos. 63, 71, 72, 74, 75 :—10 Duranton, nos. 127, 128 :—2 Déc. des Tribunaux, B. C., p. 186 :—3 Zachariæ, p. 147 :—Marceau, Transactions, nos. 2, 11, 12, 13, 16, 20, 28, 132, 151, 153, 154, 160, 161.

Sur la garantie résultant du transport : Pothier, Hyp., pp. 468 et suiv. :—Dalloz, Recueil, vbo. Hypothèque, p. 421, § 5.

2° Cet acte doit subsister ainsi que l'hypothèque qui l'accompagne jusqu'à ce qu'elle soit déclarée prescrite, et que la partie à laquelle on l'oppose invoque spécialement la prescription et la fasse prononcer par voie d'exception.

3° L'acte du 24 septembre, 1829, entraîne également une hypothèque et comporte une reconnaissance de l'obligation antérieure, et cet acte, comme le premier, reste intact et exécutoire, à moins que la prescription ne soit demandée et prononcée.

4° L'acte de transaction du 26 décembre, 1839, reconnaît et admet l'existence des hypothèques résultant des deux actes antérieurs et établit d'une manière authentique la preuve de l'existence de la créance de l'appelant et de l'hypothèque sur la propriété de l'intimé.

5° L'appelant avait droit, indépendamment de toute autre considération, de faire déclarer la propriété de l'intimé assujétie à l'hypothèque résultant de ces obligations sans examiner la question de la répartition ou de la discussion, la répartition et la discussion n'étant que pour régler et déterminer le mode de paiement.

6° L'appelant avait droit à tout événement de faire déclarer la propriété hypothéquée pour interrompre la prescription.

7° L'acte de transaction du 26 décembre, 1839, a été volontairement et librement consenti par l'intimé, et aussi longtemps qu'il subsiste la créance dont il constate et admet l'existence vis-à-vis de l'intimé ne peut être mise en question. Il ne pouvait être attaqué que par l'inscription de faux.

8° L'appelant avait établi tous les faits nécessaires pour justifier sa demande et maintenir son action.

9° La discussion ne pouvait être invoquée par l'intimé

pour repousser la demande; il était tenu, s'il voulait l'invoquer, d'indiquer les biens à discuter et d'offrir les frais.

10° La répartition ne pouvait être un moyen d'exception recevable, c'était aux débiteurs à l'établir; dans l'absence d'aucune preuve et d'aucune allégation de la part du débiteur, le créancier avait droit de demander la proportion divise et de réclamer cette proportion de la créance de chacun des débiteurs—et l'appelant maintient que cette répartition n'était pas requise en loi pour lui donner droit d'exercer sa créance et d'obtenir une condamnation hypothécaire contre l'intimé.

Jugement fut rendu le 30 avril, 1864, par M. le juge LORANGER, comme suit :

La Cour, etc :—“ Considérant que par l'acte du 26 décembre, mil huit cent trente-neuf, reçu devant M^{re} Charlebois et son confrère, notaires, et qui fait l'élément principal de la cause du demandeur, lequel acte, ainsi que le prétend le dit demandeur, est un acte de transaction, le demandeur tant en son nom que comme procureur de sa mère, dame Catherine Chaussegros de Léry, veuve de feu Jacques-Philippe Saveuse de Beaujeu, écr., a consenti par voie de transaction à abandonner un quart de la créance, en capital et intérêts, créée en faveur du dit Jacques-Philippe Saveuse de Beaujeu par le nommé Antoine Filion, père, en vertu de l'acte ou obligation du 31 janvier, 1821, et que de son côté le défendeur s'était obligé, toujours par voie de transaction, après que la dite dame de Beaujeu aurait fait discuter les biens du dit Antoine Filion, père, pour tout ce qui lui était dû, tant en vertu de la dite obligation qu'autrement, à lui payer un onzième dans la balance qui resterait dûe sur les trois autres quarts, avec intérêt, et ce en quatre paiements égaux, le premier devant se faire trois mois après telle discussion, et que sans cette discussion le demandeur ne pouvait réclamer personnellement du défendeur aucune des sommes d'argent que le

dit défendeur, par le dit acte du 26 décembre, 1839, s'est engagé à payer en déduction de la dette du dit Antoine Filion.

“ Considérant qu'aux termes du dit acte du 26 décembre, 1839, le demandeur ne peut non plus exercer aucun recours hypothécaire contre le défendeur à raison de la même créance constatée par celui du 31 janvier, 1821, avant d'avoir fait telle discussion des biens du dit Antoine Filion comme ci-dessus énoncé, la réserve de l'hypothèque créée par l'acte du 31 janvier, 1821, qui se trouve à l'acte de transaction, ne pouvant avoir d'effet que sur le défaut du défendeur, mis par la discussion des biens de Filion, en demeure de payer les sommes pour lesquelles il avait transigé, sommes dont le chiffre ne peut d'ailleurs être constaté que par telle discussion.

“ Considérant que sans cette discussion faite des biens du dit Antoine Filion, le demandeur est sans action personnelle ou hypothécaire contre le défendeur à raison du dit acte du 26 décembre, 1839, et que la preuve de cette discussion est un élément essentiel de cette partie de la demande relative au dit acte en dernier lieu mentionné.

“ Considérant que le demandeur a succombé dans la preuve qu'il a tenté de faire de la discussion des biens du dit Antoine Filion, et que, conséquemment, il ne peut justifier des conclusions personnelles et hypothécaires qu'il a prises contre le défendeur en recouvrement de partie des sommes mentionnées au dit acte du 26 décembre, 1839.

“ Considérant de plus, que le dit feu Jacques-Philippe Saveuse de Beaujeu n'a jamais eu d'hypothèque sur la terre possédée par le défendeur en vertu de l'obligation du 24 septembre, 1829, attendu que le dit Antoine Filion n'était plus alors propriétaire de la dite terre qui était sortie de ses mains et qui n'y est pas rentrée depuis, et qu'il résulte que le demandeur est sans action hypothécaire

contre le défendeur à raison des sommes de deniers que, par le dit acte du 24 septembre, 1829, le dit Antoine Filion s'est engagé à payer au dit Jacques-Philippe Savenuse de Beaujeu, et qu'il est également mal fondé dans ses conclusions hypothécaires relatives au dit acte.

"Faisant droit sur les deux moyens de défense invoqués par le défendeur, et sans prononcer de jugement sur les autres, ce que, dans les circonstances du présent litige, il ne convient pas de faire, a débouté et déboute le demandeur de son action avec dépens."

La Cour d'Appel a confirmé ce jugement en autant "qu'il n'y a pas d'erreur."

LAFLAMME, R. et G., pour l'appelant.

DOUTRE et DOUTRE, pour l'intimé.

COUR DE CIRCUIT.—ARTHABASKA.

Présent :—POLETTE, Juge.

No. 1122.	{	BELIVEAU.....	<i>Demandeur.</i>
		vs.	
		MORELLE.....	<i>Défendeur.</i>

Jugé :—1o. Que la caution solidaire profite, comme la caution simple, de l'article 2037 du Code Napoléon, qui n'est qu'une reproduction de l'ancien droit. Le créancier ne devant pas, par son fait, laisser diminuer ou éteindre les sûretés et hypothèques auxquelles la caution a droit d'être subrogée.

2o. Que le *fait* du créancier est aussi bien *in omittendo*, comme *in committendo*.

Held :—1o. That the joint surety takes advantage as well as the *caution simple* of the article 2037 of the Code Napoleon, which is taken from the old french law. It not being lawful for the creditor, by his act, to permit the hypothec, to which the surety has a right to be subrogated, to diminish or to become extinct.

2o. That the act of the creditor is as well *in omittendo*, as *in committendo*.

Jugement rendu le 7 mai, 1866.

Le demandeur réclamait du défendeur \$28.91, montant d'une obligation que Jean Barrette, du township de Somerset, avait consentie au demandeur devant Cormier et

son confrère, notaires, le 19 décembre, 1858, et dont le défendeur s'était porté pleige et caution solidaire de Barrette; par le dit acte, Barrette hypothéqua spécialement une terre située à Somerset, dans le comté de Mégantic, et Morelle, le défendeur, hypothéqua spécialement une terre dans le township de Stanfold, dans le comté d'Arthabaska. Le demandeur fit enregistrer l'obligation dans le bureau d'enregistrement du comté d'Arthabaska et ne le fit pas enregistrer dans le bureau d'enregistrement du comté de Mégantic; Barrette vendit sa terre et devint insolvable; le demandeur s'adressa à la caution solidaire pour le paiement du montant de son obligation et intenta son action contre lui.

A cette demande, Morelle répondit: que le demandeur ayant négligé d'enregistrer l'obligation de Barrette, le débiteur principal, dans le comté de Mégantic, pour conserver son rang d'hypothèque sur la terre qu'il avait hypothéquée; que Barrette ayant vendu sa terre, l'hypothèque était perdue, Barrette étant devenu insolvable; que toutes ses obligations envers Beliveau avaient cessé d'être et d'exister depuis l'instant que, par sa faute, *in omittendo* et *in committendo*, Beliveau ne pouvait plus lui transporter la créance avec les privilèges et hypothèques qui y étaient attachés lorsqu'il avait consenti l'acte de cautionnement; et comme ces garanties avaient été perdues par la faute et la négligence de Barrette, il n'était plus responsable comme caution solidaire, et était complètement dégagé de son obligation. (1)

Le demandeur répondait que ces autorités n'étaient applicables qu'à la caution simple et non à la caution soli-

(1) 7 Merlin, Questions de Droit, vbo. Solidarité, p. 590, § 5 :—1 Rogron, Code Napoléon, art. 2037, p. 756 :—18 Duranton, no. 382, p. 402, note 1re :—Zacharie, (Massé et Vergé) no. 763, p. 79, notes 2 et 3 :—1 Dalloz, Dictionnaire de Jurisprudence, vbo. Caution, nos. 209, 210, § 16, p. 360 :—6 Boileau, p. 688, sur l'art. 2037, *in fine* :—2 Rolland de Villargues, Dictionnaire du Droit Civil, vbo. Caution, § 8, p. 240 :—1 Sirey, Codes Annotés, art. 2037, p. 916, note 1 :—Ponsot, Cautionnement, no. 329, pp. 409 et suivantes :—Vuilleaumes, art. 2037, pp. 669, 670 :—Rivière, Variations de la Cour de Cassation, no. 544, p. 709, no. 547, p. 713 :—Pothier, Obligations, no. 557.

daire, et encore que le demandeur n'était pas obligé de surveiller son débiteur, que c'était à la caution solidaire à le faire. (1)

Le demandeur soutint que le *fait* du créancier n'est que *in committendo, sed non in omittendo*. (2)

Que dans l'ancienne Jurisprudence, le *fait* du créancier ne s'entendait que *in committendo sed non in omittendo*. (3)

La Cour débouta l'action avec dépens sur le principe que le défendeur était délié de ses obligations par le *fait* du demandeur *in omittendo* et par des *faits* particuliers à la cause *in committendo*.

DUVAL, pour le demandeur.

RICARD, E. L., pour le défendeur.

(1) 4 N. Denisart, vbo. Caution, § 2, p. 322 :—17 Troplong, Cautionnement, no. 557 :—1 L. C. Rep. p. 354, Redpath vs. Macdougall :—9 L. C. Jurist, p. 101, Quinn vs. Edson, voir aussi Mourton, Subrogation, pp. 480 et suivantes.

Autorités du défendeur que le *fait* du créancier est aussi bien *in omittendo* comme *in committendo* :

Pothier, Vente, no. 565 :—Loyseau, Garantie des Rentes, chap. 11, nos. 13 et suiv., p. 25 :—Louet et Brodeau, Arrêt, F. 25, p. 75 et suiv. nos. 6, 7, 8 :—1 Despeisses, Part 1, Titre 1er, § 20, no. 21, p. 58 :—Lacombe, vbo. Garantie, no. 9, pp. 314, 315 :—Digeste, livre 46, loi 95, § 11, de *solutionibus et liberationibus* :—1 Rogron, Code Napoléon, art. 2037, pp. 754, 755 :—3 Delvincourt, Commentaire, pp. 146, 205, note 6 :—18 Duranton, no. 382, p. 403 et suiv. :—Troplong, Vente, no. 941 ; idem. Cautionnement, no. 565 :—5 Zacharie, no. 763, p. 79, note 2 :—2 Duvergier, Rente, nos. 276, 277, p. 333 :—6 Boileau, art. 2037, pp. 685, 686 :—2 Rolland de Villargues, Dictionnaire, vbo. Caution, § 8, p. 240 :—Ponsot, Cautionnement, no. 332, pp. 414, 415, 416, 417, no. 333, pp. 417, 418 :—1 Sirey, Codes Annotés, art. 2037, p. 916.

(2) Pothier, Obligations, no. 557, :—7 Toullier, no. 172, p. 243 :—5 Favard de Langlade, Répertoire, vbo. Subrogation, § 2, no. 8, p. 272 :—3 Mourton, Répétitions sur le Code Napoléon, no. 1161, p. 459, note 1, voir aussi son traité sur la Subrogation p. 518 et suivantes.

(3) 18. Duranton, no. 382, p. 404 :—Ponsot, Cautionnement, no. 332, pp. 414, 415 Pothier, Obligations, no. 557.

BANC DE LA REINE, } DISTRICT DE MONTREAL.
EN APPEL.

Présents :—DUVAL, Juge-en-Chef, AYLWIN, MEREDITH,
DRUMMOND et MONDELET, Juges.

LA CORPORATION DE LA PAROISSE DE SAINT-
BARTHELEMY *Appelante.*

et

DESORCY *Intimé.*

Jugé :—1o. Que l'établissement et ouverture d'un chemin par une municipalité, en 1859, ne pouvait être fait que sur procès-verbal d'une personne déléguée par le conseil de la municipalité, avec les pouvoirs de surintendant de comté, en donnant avis de sa procédure ; et que ce procès-verbal ne pouvait être homologué, à moins qu'avis n'en eût été donné.

2o. Que sur demande en nullité de vente faite par la municipalité, pour défaut de paiement de la répartition, le demandeur pouvait, par une réponse à l'exception des défendeurs, invoquer la nullité d'un règlement subséquent à celui dont il se plaignait.

3o. Qu'une partie à l'action directe résultant de la nullité d'un règlement, sans être obligée de prendre la voie de révision ou d'appel du règlement.

Held :—1o. That the establishment and opening of a road by a Municipality, in 1859, could only be made upon the *procès-verbal* of a person appointed by the Municipal Council, with the powers of superintendant of a county, giving notice of his proceedings ; and that such *procès-verbal* could not be homologated unless notice of such homologation was given.

2o. That on demand to annul a sale made by the municipality, by reason of default of payment of the partition, the defendant could, by an answer to the exception of the defendant, invoke the nullity of a by-law subsequent to the one he complained of.

3o. That a party has a direct action, by reason of the nullity of a by-law, without the necessity of making a demand of revision or of appeal from such by-law.

Jugement rendu le 8 mars, 1866.

Le 4 de février 1861, la corporation de la paroisse de St. Barthélemy mettait en vente une terre appartenant à l'intimé, pour défaut de paiement de la somme de £2.11.4, répartition par elle imposée sur cette terre pour l'ouverture de certains chemins dans la paroisse, et le nommé Joseph Dandonneau, un des défendeurs en cour de première instance, se rendait adjudicataire d'un quart de la terre, pour le montant dû tel que ci-dessus expliqué. C'était cette vente que Désorcy, par l'action en cour de première instance, voulait faire mettre au néant, prétendant que les règlements en vertu desquels avait eu lieu la vente étaient irréguliers et nuls ; Dandonneau fit défaut et l'action fut contestée par la corporation. Les faits peuvent se résumer comme suit :

Le 4 juillet, 1859, Joseph Adam et autres présentèrent une requête à la corporation de la paroisse de St.-Barthélemy, demandant l'ouverture d'un chemin depuis le fleuve St.-Laurent jusqu'à la concession du Petit St.-Jacques, dans cette paroisse. Cette demande fut renvoyée à un comité composé de trois membres du conseil, dont deux firent un rapport le 10 juillet, 1859, recommandant l'ouverture du chemin, et ce rapport fut reçu le 16 du même mois. Le 30 de juillet, François Rouleau, alors secrétaire-trésorier, et faisant les fonctions de surintendant du comté à l'égard d'une autre demande, fit un procès-verbal basé sur le rapport du comité, contenant l'énoncé qu'il serait soumis au Conseil le lendemain. Enfin, le 5 de septembre 1859, le conseil municipal adoptait un règlement concernant le chemin en question et celui pour lequel Rouleau avait été délégué; voici le préambule de ce règlement :

“ Attendu le rapport de Frs. Rouleau, Ecr., nommé pour
 “ remplir tous les devoirs et exercer tous les pouvoirs ci-
 “ devant dévolus au surintendant de comté, touchant la
 “ requête de Rémy Rémillard et autres, propriétaires de la
 “ paroisse de St. Barthélemy, demandant par la dite re-
 “ quête un chemin de front à travers les terres de la con-
 “ cession de la baie Belair, et un chemin de ligne ou route,
 “ depuis le dit chemin de front à être établi dans la dite
 “ concession, à aller au chemin de front du Petit St. Jacques,
 “ dans la dite paroisse St. Barthélemy; et attendu, de plus,
 “ le rapport de Joseph Bernèche et François-Xavier Ger-
 “ vais, formant la majorité des membres composant le
 “ comité nommé par ce conseil à l'effet de visiter les lieux
 “ mentionnés dans une requête présentée à ce conseil par
 “ Joseph Adam, et autres propriétaires de terres dans la
 “ concession du nord, dans la paroisse St. Barthélemy, de-
 “ mandant, par leur dite requête, l'ouverture et l'établisse-
 “ ment de divers chemins de ligne, depuis le chemin de
 “ front de la dite concession du nord, à aller au chemin de
 “ front de la dite concession du Petit St. Jacques, dans la

“ dite paroisse St. Barthélemy : le dit conseil municipal.....
 “ décrète, etc.”

Ce règlement fut publié à la porte de l'église de la paroisse St. Barthélemy les 11 et 18 septembre, 1859, suivant certificat assermenté.

Des procédés furent ensuite adoptés pour évaluer les terrains nécessaires pour ces chemins, et le 1er octobre, 1860, le conseil municipal fit un règlement imposant une taxe pour payer la somme de 2845 francs, montant des expropriations, règlement qui fut publié les 7 et 14 octobre.

Desorcy, dans son action, alléguait que la vente de son terrain était illégale et nulle, en autant qu'il n'existait, et n'avait jamais existé, aucun règlement, procès-verbal, ni résolution, ni décision ou arrêté du conseil municipal légalement fait ou adopté, et légalement publié, imposant au demandeur le paiement d'une cotisation ; que notamment le règlement du 1er d'octobre, 1860, n'avait jamais été lu à la porte de l'église, et que le chemin en question n'avait jamais été légalisé par procès-verbal dûment homologué.

La corporation, défenderesse, plaida que le règlement du 1er d'octobre, 1860, avait été dûment publié et que “ le chemin en question avait été dûment légalisé par divers “ arrêtés et règlements du dit conseil municipal, et entre “ autres par celui du 5 de septembre, 1859, et dûment mis “ en force après toutes les formalités voulues par la loi en “ pareil cas, ayant été précédé d'un rapport d'un comité “ nommé le 4 de juillet, 1859, et d'un rapport de Frs. Rou- “ leau, nommé par le conseil pour remplir les devoirs et “ exercer les pouvoirs ci-devant dévolus au surintendant “ de comté.”

Le demandeur répondit à cette exception en déclarant que le règlement du 5 septembre, 1859, était nul à sa face même : 1° Parce que le conseil n'avait ni pouvoir, ni auto-

rité pour ouvrir le chemin en question ; 2° Parce que le conseil ne pouvait renvoyer ce sujet à un comité, mais “ était tenu de nommer une personne convenable alors “ censée l'un des officiers municipaux du dit conseil, qui “ aurait fait la visite des lieux, après avis donné préliminairement aux intéressés, en aurait dressé procès-verbal, “ pour être homologué par le dit conseil, encore après avis “ donné aux intéressés du jour de la présentation du dit “ procès-verbal pour homologation ; ” 3° Que le rapport du comité était nul.

La corporation répliqua que cette réponse était mal fondée en droit, prétendant que le demandeur cherchait à refaire son action au moyen de nouvelles allégations qui auraient dû être contenues dans sa déclaration.

La Cour de première instance rendit, le 18 d'octobre, 1862, le jugement suivant :

BADGLEY, Juge :— “ La Cour, etc.—Considérant que le règlement du conseil municipal de la paroisse de St. Barthélemy, en date du 5 septembre, mil huit cent cinquante-neuf, mentionné dans les procédures en cette cause, qui ordonne l'ouverture et établissement d'un chemin de ligne ou route depuis le chemin de front de la concession du Chenal du Nord à aller au chemin de front de la concession du Petit St. Jacques, dans la dite paroisse, et pour le paiement du terrain nécessaire pour l'ouverture et établissement du dit chemin de ligne ou route, tel que mentionné spécialement aux articles sept, huit et neuf du dit règlement, et en outre aux autres articles d'icelui y ayant rapport, n'a pas été précédé, accompagné ni suivi des formalités voulues et requises par la loi :

“ Considérant qu'il n'y a pas eu de procès-verbal au préalable fait et déposé au dit conseil, et que les intéressés au dit chemin ou route n'ont pas été notifiés, suivant la loi, des dits procédés du dit conseil ; et considérant que les procédés du dit conseil, ultérieurs à la date du dit règle-

ment, ont été basés sur le dit règlement illégal, adjuge et ordonne que le présent jugement soit et est déclaré commun aux dits défendeurs, la dite corporation de la paroisse St. Barthélemy et le dit Joseph Dandonneault ; que la dite vente et adjudication, dans la déclaration du demandeur mentionnée, le quatre février, mil huit cent soixante-et-un, au dit Joseph Dandonneault, par le dit François Rémi Tranchemontagne, en sa qualité de secrétaire-trésorier du dit conseil municipal du comté de Berthier, du juste quart en superficie du terrain du dit demandeur, décrit en la dite déclaration comme suit : Un terrain situé dans la seigneurie de Maskinongé, dans la seconde concession du Nord, dans la municipalité de la paroisse de St. Barthélemy, contenant environ quinze arpents en superficie, borné en front par la première concession du Nord, par derrière par la concession du Petit St. Jacques, d'un côté à Pierre Desorcy, d'autre côté à Alexis Ayotte, dans la municipalité du comté de Berthier, le dit juste quart à prendre par une portion de terre en front, suffisante pour former, sur toute la profondeur du susdit terrain du dit demandeur, le juste quart en superficie de la totalité du dit terrain, soit et est par les présentes déclarée être nulle et de nul effet, comme non avenue, et rescindée et mise à néant, et en conséquence que les dites parties, savoir : le demandeur et les dits défendeurs, soient et sont censés au même état qu'elles étaient avant la dite vente et adjudication au dit jour quatre février, mil huit cent soixante-et-un ; la Cour condamne en outre le dit Joseph Dandonneault à rendre et restituer au dit demandeur le dit juste quart en superficie du dit terrain, au dit demandeur ci-dessus décrit, sous quinze jours de la signification du présent jugement, sinon et le dit délai passé, à ce qu'il y soit contraint par main de justice en la manière accoutumée ; enfin la Cour condamne la dite défenderesse à remettre au dit Joseph Dandonneault la dite somme de deux livres onze chelins et quatre deniers, montant de la dite vente et adjudication, etc., avec dépens."

La corporation appela de ce jugement, se plaignant :

1° Qu'il n'était pas motivé tel qu'il aurait dû l'être. (1)

2° Que la réponse du demandeur n'avait pas été rejetée, la Cour de première instance n'ayant pas adjugé sur la réplique en droit. (2)

3° Que le jugement était illégal, vu que le demandeur n'avait pas l'action directe, mais seulement un recours en appel ou révision, recours qu'il n'avait pas adopté en temps opportun. (3)

Enfin, la corporation, appelante, soutenait qu'il n'était besoin ni de procès-verbal de surintendant, ni formalité autre que le règlement même, pour l'ouverture et la confection d'un chemin. (4)

Sur ce dernier point, l'intimé, demandeur, invoquait la loi municipale en force en 1859. (5)

Le jugement fut confirmé en appel.

PICHÉ, pour l'appelant.

OLIVIER et ARMSTRONG, pour l'intimé.

(1) Stat. Ref. B. C., cap. 83, sec. 39 :—Chauveau, Dict. de Proc., vbo. Jugement, nos. 147, 161.

(2) Ord. 1667, tit. 35, art. 34.

(3) 19 et 20 Vict., cap. 101, sec. 9 :—Acte des municipalités et des chemins de 1860, 23 Vict., cap. 61, sec. 26, 66, sous-secs. 1, 2, 3, 4 ; secs. 67, 68 :—Amendements de 1863, 27 Vict., cap. 9, secs. 13, 14 :—Chauveau, Lois de la Proc., Quests. 1582, 1583, 1584 :—Le Merle, pp. 46, 96, 106, 108, 109, 122, 186 :—De Puibusque, Dict. Munic., vbo. Conseils de Préfecture :—Chauveau, Code d'Instruction Admin., no. 563.

(4) Acte des municipalités et des chemins du B. C., Stat. Ref. B. C., cap. 24, secs. 24, 27, 40 ; sous-secs. 10, 11, 12, 13, 14 ; secs. 43, 44, 50, 63.

(5) 18 Vic., cap. 100, sec. 47 ; ainsi que la sec. 19, sous-secs. 8, 13 :—5 L. C. Jurist, 229 :—2 L. C. Jurist, p. 116.

BANC DE LA REINE, } DISTRICT DE MONTREAL.
 EN APPEL.

Présents :—AYLWIN, MEREDITH, DRUMMOND et MONDE-
 LET, Juges.

EVANS.....*Appelant.*

et

CROSS, *et al.*.....*Intimés.*

Jugé :—Que la date écrite sur un billet fait preuve que le billet a été fait ce jour là, et que, dans l'espèce, la partie demanderesse ne pouvait prouver que le billet avait été fait à une date postérieure; et qu'en conséquence le billet en question tombait sous l'opération d'un acte d'atérmoirement subséquent entre les intimés et leurs créanciers, au nombre desquels était l'appelant.

Held :—That the date of a promissory note is proof that such note was made on the day of its date, and that, in the case submitted, the party could not prove that the note had been made upon a day posterior to its date; and that the note in consequence fell within the operation of a subsequent deed of composition between the respondents and their creditors, among whom was the appellant.

Jugement rendu le 7 septembre 1866.

L'appelant poursuivit les intimés devant la Cour Supérieure à Montréal, en recouvrement d'un billet pour la somme de \$213.22, daté le 5 de mai, 1862, et payable à vingt-quatre mois de sa date.

Par exception, les intimés plaidèrent que par acte d'atérmoirement fait vers le 22 de mai, 1862, entre eux et leurs créanciers, ces derniers étaient convenus d'accepter dix chelins dans le louis, payables avec caution suffisante, à six, douze et dix-huit mois, à compter du 20 de mars alors dernier; que l'appelant avait signé l'acte dont les intimés avaient depuis longtemps rempli les conditions; que le billet dont le demandeur poursuivait le recouvrement, étant d'une date antérieure à l'acte d'atérmoirement, se trouvait éteint et acquitté par cet acte.

L'acte d'atérmoirement était sous seing privé et contenait ce qui suit :

“ The subscribing creditors of Cross and Park, traders,
 “ Beauharnois, hereby agree for themselves, their heirs
 “ and assigns, to accept from the said Cross and Park a
 “ composition of ten shillings (10s) in the pound, payable

"with satisfactory security in equal proportions of six, twelve and eighteen months, from the twentieth day of March last past, said composition, when paid, to be in full satisfaction and discharge of our respective claims against them, provided this arrangement be carried into effect on or before the first day of June next ensuing."

Il n'y avait pas de date. A la suite de cet écrit, était apposé le nom de l'appelant et en regard les chiffres \$342.40.

A l'enquête les intimés produisirent le document suivant, établissant le règlement de compte arrêté entr'eux et le demandeur :

" Cross & PARK,		In account with J. HENRY EVANS, Dr.	
1862, February 5th.	To Goods due May 5th.....	\$ 6 81	
" " 11th.	To " " "	38 05	
" May 2nd.	To cash paid note.....	297 54	
			<u>\$342 40</u>
Cr.			
1862, June 25th.	By endorsed note, due November 23rd.....	\$57 07	
	Less interest....	2 21	
			<u>\$54 86</u>
"	Endorsed note, due May 23rd, 1863	\$57 07	
	Less interest....	4 19	
			<u>\$52 88</u>
"	Endorsed note, due November 23rd, 1863.....	\$57 07	
	Less interest....	6 23	
			<u>\$50 84</u>
			<u>\$158 58</u>
		Due May 4th, 1862.....	\$183 82
		By their note at 24 months, from 5th May, 1862.....	\$213 22
		Less two years' interest..	29 40
			<u><u>\$183 82</u></u>

E. & O. E.
Montreal, 25th June, 1862.

Settled as above, it being understood that Messrs. Cross & Park pay all the costs of suit in cash.

(Signed,)

J. HENRY EVANS,
per WILLIAM TAIT."

Les intimés, examinés comme témoins, reconnurent que ce règlement de compte n'avait eu lieu et n'avait été fait que le 25 de juin, 1862, et l'appelant, interrogé comme témoin, jura que le billet n'avait été reçu que le 25 de juin, 1862, mais avait été anti-daté, en conséquence du long délai qu'il avait à courir.

Le 31 de mai, 1864, jugement fut rendu comme suit :

SMITH, Justice :—" The Court, &c.—Considering that the said plaintiff hath failed to shew any right in law to have and maintain the conclusions of his said action, and that the said défendants have established that the note, now sought to be recovered by the said plaintiff, was due and owing before the day of the settlement of the *acte* of composition accepted by the said plaintiff, in full discharge and payment of all due and owing by defendants before that day, and that the said composition hath been paid by the said defendants. The Court doth dismiss the action with costs."

Les prétentions de l'appelant pour obtenir l'infirimation de ce jugement étaient : 1° Que le billet en question n'était pas dû et payable à l'époque de l'atерmoiemént ; 2° Que le règlement de compte avait eu lieu que postérieurement au terme fixé dans l'acte d'atерmoiemént ; 3° Que ce règlement avait eu lieu suivant des conditions différentes de celles portées en l'acte d'atерmoiemént dont la décharge conséquemment ne pouvait être applicable.

MONDELET, Justice :—" This is an appeal from a judgment of the Court of review confirming that rendered by the Superior Court at Montreal, presided by Mr. Justice Smith. The action was founded upon a promissory note and the defendants pretend that the note forms part of a composition entered into between them and their creditors, *undated*, but admitted by the plaintiff, examined as a witness by the defendants, to have been entered into,

signed and completed in the beginning of June, 1862. The note bears date, "May 5th, 1862." The plaintiff examined as a witness by the defendants swears that the note was antedated, in consequence of the long period it had to run, being payable twenty-four months after date, but he also affirms that the note was made out and received on the 25th June, 1862. Now two essential facts have to be ascertained, viz, the date of the composition, and the date of the note sued upon by the plaintiff. As to the date of the composition, the plaintiff admits the composition to have been entered into, signed and completed in the beginning of June. With regard to the note, it bears its date, May 5th 1862.

The question is whether, with the note in question before us, bearing its date upon the face of it, the plaintiff, for his own purpose, will be allowed to prove that the note was made out and received on the 25th of June following?

My opinion, in that respect, is against the plaintiff's pretension, for the obvious reason that the date of the note cannot be proved, it speaks for itself, and the plaintiff cannot, in law, nor in justice, defeat the defendants' pretension, by proving the contrary of the note he has grounded his action upon. It is quite different as to the composition, it having no date, the plaintiff admitting it was signed and completed in the beginning of June, it is conclusive against him.

I therefore think the Court of review had no choice, and in confirming the judgment of the Superior Court, dismissing the plaintiff's action, they gave a correct judgment, which ought to be confirmed by the Court of appeals.

Le jugement a été confirmé, vu qu'il n'y a pas erreur.

BETHUNE, Q. C., pour l'appelant.

COWAN, pour les intimés.

BANC DE LA REINE, } DISTRICT DE MONTREAL.
EN APPEL.

Présents : — AYLWIN, MEREDITH, DRUMMOND et MON-
DELET, Juges.

TAHRLAND..... *Appelant.*

et

RODIER..... *Intimé.*

Jugé :—Qu'un architecte ne peut être employé par le propriétaire et le constructeur en même temps et recevoir rémunération des deux ; et que le fait que l'architecte est entré en convention de recevoir une rémunération du constructeur, est suffisant pour libérer le propriétaire.

Held :—That an Architect cannot at one and the same time be employed by the proprietor and builder and receive pay from both ; and that the fact that the Architect has covenanted with the builder to receive payment from him, is sufficient to discharge the proprietor.

Jugement rendu le 7 septembre, 1866.

L'appelant poursuivait l'intimé en recouvrement de la somme de \$100, montant convenu entr'eux pour la surveillance d'une maison que l'intimé faisait construire. Dans le cours des travaux, le défendeur, mécontent des plans et informé que l'appelant devait recevoir une rémunération des entrepreneurs, le congédia. L'appelant prétendant avoir rempli ses obligations à l'égard de l'intimé porta son action en Cour de Circuit, pour le montant total, prétendant avoir surveillé les travaux jusqu'à la fin.

L'intimé opposa à cette demande une exception par laquelle il alléguait que l'appelant n'avait pas surveillé les travaux ainsi qu'il aurait dû le faire, mais qu'il s'était entendu avec les entrepreneurs pour prendre leurs intérêts moyennant rémunération, et il concluait, en conséquence, au débouté.

L'appelant, interrogé sur faits et articles, prétendit qu'il avait commencé sa surveillance "sans autre convention que le défendeur et l'entrepreneur devaient lui payer chacun la moitié de ses honoraires sans spécifier aucune somme." Il aurait pu espérer, suivant un prétendu tarif

des architectes, cinq pour cent sur le coût total de la bâtisse, en l'absence de conventions, ce qui lui aurait rapporté £150.

Le neuvième interrogatoire qui lui fut soumis était comme suit : “ Ne vous êtes vous pas abouché avec le dit “ Payette (l'entrepreneur) et ne lui avez vous pas demandé, “ en outre des plans et devis qu'il devait vous payer, une “ somme de £20 courant, pour vous indemniser de vos “ troubles ou travaux, comme architecte chargé de veiller “ à la dite construction ?”

Voici comment il répondit à cette question :

“ Non, M. Payette m'a dit un jour qu'ayant perdu de “ l'argent sur cette entreprise, je devais le laisser quitte de “ la part qu'il devait me payer pour £20. Ceci se passait “ à la fin de juin, j'ai d'abord refusé, mais m'ayant promis “ la surveillance de plusieurs maisons de première classe “ au *Beaver Hall*, j'ai plus tard accepté, mais je n'ai rien “ encore reçu.”

Le jugement a été prononcé le 26 de septembre, 1865, par la Cour de Circuit, siégeant pour le district de Montréal, l'honorable M. le Juge BERTHELOT siégeant, et est conçu dans les termes suivants :

“ La Cour, etc.—Considérant qu'il est prouvé que le demandeur s'était engagé envers le défendeur comme son architecte pour surveiller, dans l'intérêt de ce dernier, ses entrepreneurs et ses ouvriers préposés à la construction de la maison et bâtisse dont il est question tant dans la déclaration que dans les plaidoyers, et ce, moyennant une rémunération de cent piastres, et que le défendeur avait le droit de s'attendre que le demandeur lui rendrait ses services comme architecte, moyennant la somme susdite, à l'exclusion d'aucun arrangement et entendement entre le dit demandeur et les entrepreneurs et ouvriers préposés par le défendeur pour la construction de la dite maison :

“ Considérant qu’il est en preuve que durant les travaux, et presque au commencement d’eux, le dit demandeur s’était arrangé avec l’entrepreneur ou les entrepreneurs, du dit défendeur pour recevoir d’eux vingt louis, cours actuel, pour veiller à leurs intérêts à l’encontre de ceux du défendeur, et à son insçu, ce qui était une violation formelle de son engagement vis-à-vis du défendeur :

“ Considérant de plus que pour ces raisons, le dit défendeur a congédié le dit demandeur ainsi qu’il avait droit de le faire, lorsqu’il a eu connaissance de cet entendement du demandeur avec son entrepreneur ou ses entrepreneurs :

“ La Cour, pour les raisons ci-dessus, renvoie le demandeur de son action, etc.”

La Cour d’Appel, à l’unanimité, a confirmé ce jugement.

MONDELET, Juge :—Il est établi que l’appelant a forfait à ses engagements et la conduite déloyale qu’il a tenue envers l’intimé, en se mettant, comme il l’a fait, dans une position à avoir ou deux maîtres à servir à la fois, ou dans le cas de difficulté avec l’un ou l’autre de ces deux maîtres, de se ranger pour l’un, au préjudice de l’autre, a perdu tout droit de se faire payer par l’intimé. Je pense donc que l’action de l’appelant, demandeur en cour de première instance, a été justement déboutée par le jugement dont est appel, en faveur de la confirmation duquel j’opine.

DOUTRE et DOUTRE, pour l’appelant.

BELLE, J. A. A. pour l’intimé.

BANC DE LA REINE, } DISTRICT DE QUEBEC.
EN APPEL.

Présents :—DUVAL, Juge-en-Chef, AYLWIN, DRUMMOND,
BADGLEY et MONDELET, Juges.

RENAUD..... *Appelant*,
et
PROULX..... *Intimée*.

Dans une action hypothécaire intentée par Renaud contre Proulx, tiers-détenteur d'un immeuble hypothéqué par Pâquin, pour une créance par lui due à la société Renaud et frère, dont le demandeur faisait partie. La société ayant été dissoute et le demandeur étant devenu propriétaire de toutes les créances de la société :

Jugé, en Cour Supérieure :—1o. Que le seul effet d'une action hypothécaire est de faire condamner le défendeur tiers détenteur à délaisser l'héritage hypothéqué, et que le créancier n'a aucun recours personnel contre le tiers-détenteur à défaut par lui de délaisser l'immeuble.

2o. Que des conclusions demandant que le tiers-détenteur fut condamné à payer le montant pour lequel l'immeuble était hypothéqué, si mieux il n'aimait délaisser, sont des conclusions vicieuses et illégales.

3o. Que dans cette cause l'acte de cession ou transport des biens de la société, au demandeur Renaud, aurait dû être signifié au débiteur personnel Pâquin, qui avait consenti l'hypothèque.

4o. Qu'il est nécessaire de prouver dans une action hypothécaire que lors de la passation de l'acte comportant hypothèque, celui qui consentait telle hypothèque, était réellement propriétaire de l'immeuble et que le tiers-détenteur dérive son titre de tel propriétaire.

En Appel :—Que le demandeur devait nécessairement prouver, pour réussir dans son action, que Pâquin était, au temps de l'obligation, propriétaire de l'immeuble sur lequel il avait donné une hypothèque et que le défaut de telle preuve devait faire débouter l'action.

In an hypothecary action brought by Renaud against Proulx, holder of an immoveable hypothecated by Pâquin, for a debt due by him to the firm of Renaud and Brother, to which the plaintiff belonged. The partnership having been dissolved and the plaintiff become proprietor of all the debts due to the partnership :

Held, in the Superior Court :—1o. That the sole effect of an hypothecary action is to have the defendant, holder of an hypothecated immoveable, condemned to abandon it, and that the creditor has no personal recourse against the holder of the immoveable, in default of his abandoning the said immoveable.

2o. That the conclusion of the action praying that the holder be condemned to pay the amount of the mortgage against the said immoveable, unless he prefer abandon it, *délaisser*, are illegal and vicious conclusions.

3o. That in the present cause, the transfer of the assets of the partnership to Renaud, the plaintiff, ought to have been intimated to Pâquin, the personal debtor, who had given the mortgage.

4o. That it is necessary in an hypothecary action to prove that at the time of the passing of the act, which created the mortgage, the party who gave such a mortgage was really proprietor of the immoveable, and that the holder derived his title from such proprietor.

In Appeal :—That the plaintiff was bound to prove, so as to succeed in his action, that Pâquin was, at the time of the obligation, proprietor of the immoveable which he had mortgaged and that the absence of such a proof must cause the action to be dismissed.

Jugement rendu le 18 septembre, 1866.

L'intimée, était poursuivie comme tiers-détenteur d'un immeuble grevé d'une hypothèque de \$1589.11, montant

en principal et intérêts d'une obligation enregistrée, consentie par un nommé Joseph Pâquin, en faveur de la société Renaud et frère, alors composée de l'appelant et de Cyprien Fitzpatrick. La déclaration alléguait de plus que par un acte de dissolution de société, intervenu entre eux, ce dernier s'était retiré de la société, moyennant une certaine somme d'argent et avait cédé à l'appelant tous ses droits en icelle au nombre desquels se trouvait l'obligation ci-dessus. Par ses conclusions, l'appelant demandait que l'intimée fut condamnée à lui payer cette somme, si mieux elle n'aimait délaisser.

L'intimée répondit à cette demande par une défense en fait et une défense en droit. Ce dernier plaidoyer invoquait deux moyens. Par le premier, l'intimée prétendait que l'acte de dissolution de société et de transport, ainsi que le notaire l'intitulait, contenait un véritable acte de transport par Fitzpatrick, à l'appelant, de ses droits dans la société Renaud et frère, et que ces droits comprenant l'obligation en question, ce dernier aurait dû le faire signifier au débiteur originaire, (Pâquin,) avant de poursuivre l'intimée hypothécairement.

L'intimée prétendait de plus, que les conclusions de l'appelant étaient vicieuses et illégales, parcequ'il demandait que le tiers-détenteur fut condamné à payer si mieux il n'aimait délaisser.

La troisième prétention de l'intimée était que l'appelant n'avait pas prouvé que le débiteur personnel était propriétaire de l'immeuble hypothéqué, lors de la création de l'hypothèque ou en aucun temps, et qu'il avait ainsi le droit d'hypothéquer cet immeuble.

La Cour Supérieure, par son jugement du 6 juin, 1866, maintint les prétentions de l'intimée.

BLANCHET, pour l'appelant :—L'Obligation, il est vrai, a été consentie à une société composée de deux personnes.

Mais, quels étaient les droits des associés sur les biens de cette société ? Ce ne pouvait être qu'un droit conditionnel dépendant de l'événement du partage. Et jusqu'au moment de la dissolution de la société Renaud et frère, l'appelant et Fitzpatrick, n'avaient aucun droit déterminé sur une partie quelconque de cette obligation. Le partage seul devait fixer ces droits en assignant à chacun son lot. Maintenant, quels sont les effets de l'acte de dissolution de la société Renaud et frère ? Cet acte, de quelle que manière que le notaire se soit plut à l'appeler, est réellement un acte de partage, puisqu'avant sa confection la société Renaud et frère avait une jouissance indivise des biens de cette société, et qu'aussitôt qu'il a été passé, il a fait cesser cette indivision en attribuant à l'appelant tous les droits que Fitzpatrick pouvait avoir dans les créances de la société. Or, Pothier et plusieurs auteurs disent que : "Chaque copartageant est censé avoir succédé immédiatement à toutes les choses comprises dans son lot ou à "à lui échues sur licitation." (1)

Delvincourt dit encore : "Chacun des copartageants est censé avoir été le propriétaire des objets échus à son lot, à partir du moment où ils sont entrés dans la société."

L'acte de partage qui a eu lieu entre l'appelant et Fitzpatrick a donc eu l'effet de déterminer que tous les biens et tous les droits actifs et passifs de la société Renaud et frère avaient toujours appartenu à l'appelant, moins la somme d'argent reçue par Fitzpatrick, pour représenter sa part dans la dite société. Donc l'obligation de Pâquin est censée avoir toujours appartenu à l'appelant. Donc Pâquin est censé n'avoir contracté qu'avec lui. Donc ce dernier peut poursuivre le recouvrement de cette obligation, sans qu'on puisse lui opposer le défaut de signification d'un transport qui n'a jamais existé aux yeux de la loi.

(1) Pothier, Oblig., No. 445 ; Communauté, 140, 711, 713 ; Vente, 631 ; Société, 179 ; Succession, ch. 4, art. 5, sec. 1 :—2 Malleville, 330, C. N. 683 :—Guyot, Rep. vbo. Société :—2 Demolombe ; Des successions, Nos. 272, 297 :—Dalloz, Soc. Civ., No. 413.

Quant à la seconde question, l'appelant prétend que ses conclusions sont en tout conformes à l'art. 101, de la Cout. de Paris, qui dit formellement que : " les détenteurs et " propriétaires d'héritages hypothéqués à aucunes rentes " ou charges réelles, sont tenus hypothécairement icelles " payer etc... ; à tout le moins sont tenus iceux héritages " délaisser."

Tel est aussi le droit du Code Napoléon, (art. 2168) et cette doctrine est enseignée par Pothier, hypothèque, p. 444, où il dit : " Que quoique ces conclusions ne soient pas exactes dans l'élocution, elles n'en sont pas moins valables ; et nonobstant le renversement d'ordre dans l'élocution, ajoute-t-il, c'est le délais (délaissement) qui est considéré comme l'objet et des conclusions et de la prononciation ; le paiement n'est qu'une faculté accordée au détenteur pour éviter le délais." (1)

Dans tous les cas, les conclusions de l'appelant demandaient, de plus, que l'intimée fut condamnée à délaisser, et cette partie de la demande aurait au moins dû être accordée.

TASCHEREAU, H. T. pour l'intimée.—L'appelant ne pouvait réussir dans ses conclusions qui étaient personnelles contre l'intimée, parce que, quant au tiers-détenteur, il n'est tenu, au point de vue du paiement, d'aucune obligation personnelle : et s'il paie, c'est par l'effet unique de sa volonté, pour éviter l'expropriation, qui est la seule conclusion possible de l'action hypothécaire, vis-à-vis d'un tiers-acquéreur. (2)

Le transport fait par Fitzpatrick à l'appelant aurait dû être signifié au propriétaire de l'immeuble hypothéqué, et

(1) 2 Pigeau, pp. 593, 596 :—Nouveau praticien français, p. 246 :—Bourjon, Dt. Com. de la France, II vol., p. 542, No. 7, et p. 546 :—Domat, Supplément aux lois civiles, liv. 4, tome 1er, § 9., p. 228 :—2 L. C. Jurist, p. 303.

(2) Paul Pont, Privilèges et Hypothèques, vol. I, Nos. 1127, 1129 :—Pothier, Hypothèque, ch. II, art. III :—20 Duranton, No. 233, p. 376 :—Loyseau, liv. III, ch. 4 :—9 L. C. Jurist, p. 179.

faute de cela, l'appelant ne peut pas même réussir pour une portion quelconque de la créance, vu que sa part originaire dans l'association "L. Renaud et Frère" n'est pas constatée, et d'ailleurs la réclamation de partie de la créance ne pouvait se faire au nom d'un seul associé, sans que la raison de cette réclamation partielle ne fut alléguée et justifiée.

" L'hypothèque étant un droit dans la chose, c'est une conséquence qu'elle ne peut être accordée que par celui à qui la chose appartient et qui en est le propriétaire, celui qui ne l'est pas, ne pouvant pas transférer à un autre un droit qu'il n'a pas lui-même." (1)

L'appelant a failli de prouver que le nommé Pâquin eût réellement le droit comme propriétaire de créer l'hypothèque en question, ses titres de propriété n'ont pas été produits, il n'a pas été examiné comme témoin ; enfin il n'était pas démontré à la Cour que l'appelant eut un droit sur l'immeuble possédé par l'intimée, c'est-à-dire qu'il eut une hypothèque. L'appelant devait établir les sources de son droit, tout comme il l'aurait fait dans une action au pétitoire, et cette conséquence découle de la définition même du droit d'hypothèque.

Le jugement rendu par TASCHEREAU, Juge, en Cour Supérieure, était dans les termes suivants :

La Cour, etc.— " Considérant que le seul effet d'une action hypothécaire est de faire condamner le défendeur tiers-détenteur à délaisser l'héritage hypothéqué, et que le créancier n'a aucun recours personnel contre le tiers-détenteur à défaut par lui de délaisser l'immeuble :

" Considérant que l'octroi par cette Cour des conclusions de la déclaration du demandeur exposerait la défenderesse ou ses héritiers, malgré l'option qui lui serait laissée de délaisser, à devenir débitrice personnelle du deman-

(1) Pothier, Hypothèque, ch. I, sect. II, § 2.

deur dans le cas où par absence, indisposition, mort ou autres empêchements quelconques, la défenderesse ne pourrait faire le délaissement, et dans ce cas, à payer sur ses propres biens une dette considérable excédant peut-être dix fois la valeur de l'immeuble qu'elle aurait dû délaisser.

“ Considérant que le demandeur n'a pas demandé à amender ; considérant qu'en autant les conclusions de la déclaration du demandeur sont vicieuses et illégales ; considérant que partie de la créance réclamée en cette cause a été cédée au demandeur, en vertu d'un acte de cession ou transport qui n'a pas été signifié au débiteur personnel, savoir : le nommé Joseph Pâquin, ni été accepté par lui en aucune manière ; considérant qu'en autant le demandeur, quoique membre d'une association à laquelle la dite créance appartient en entier, n'a pas été saisi de la dite créance de manière à pouvoir exercer son droit d'action hypothécaire contre la présente défenderesse, même pour une portion quelconque de la dite créance, vu que la part originaire du demandeur dans la dite association n'est pas constatée, et que d'ailleurs la réclamation de partie de la créance susdite ne peut se faire au nom d'un seul associé sans justifier et alléguer la raison de telle réclamation partielle :

“ Considérant que le demandeur a failli de prouver que le nommé Joseph Pâquin, débiteur principal de l'obligation du 11 de septembre, 1858, fût lors de la passation du dit acte, ou en aucun temps propriétaire de l'immeuble désigné au dit acte d'obligation, ou que la défenderesse dérivât son titre de propriété au dit immeuble du dit Joseph Pâquin ; la Cour maintient les défenses au fonds en droit et en fait de la défenderesse avec dépens, et renvoie l'action du demandeur avec dépens, sauf à se pourvoir, etc.”

La Cour d'Appel confirma le jugement ci-haut, en autant qu'il n'y avait pas erreur dans le dernier considérant. Voici le jugement en appel :

La Cour, après avoir entendu les parties, par leurs avocats respectifs sur le mérite, examiné le dossier de la procédure, en Cour de première instance, ainsi que les griefs d'appel produit par le dit appelant, et les réponses à iceux, et sur le tout mûrement délibéré :

“ Considérant que le demandeur a failli dans la preuve par lui offerte, en Cour Supérieure, de constater que le nommé Joseph Pâquin, lors de la passation de l'acte d'obligation par lui consenti en faveur de Louis Renaud et Cyprien Fitzpatrick, à Montréal, le onze de septembre, mil huit cent cinquante-huit, était propriétaire du terrain sur lequel le demandeur réclame un droit d'hypothèque ; et que, en conséquence de ce défaut de preuve, l'action du demandeur devait être déboutée avec dépens, et que, partant dans le jugement prononcé par la Cour Supérieure, à Québec, le six de juin, mil huit cent soixante-et-six, déboutant l'action du demandeur, il n'y a pas erreur, cette Cour confirme le dit jugement, etc.”

TASCHEREAU et BLANCHET, pour l'appelant.

MONTAMBAULT ET TASCHEREAU, pour l'intimée.

COUR SUPERIEURE.—QUEBEC.

Présent :—STUART, Juge.

No. 36.	{	CRÉMAZIE, <i>et al.</i>	<i>Demandeurs.</i>
		CAUCHON.....	<i>Défendeur.</i>
		vs.	

Jugé :—Que le cessionnaire a droit de se servir du nom de son cédant et de porter son action au nom de tel cédant.

Held :— That the assignee has the right of using the name of his assignor and to bring suit in the name of such assignor.

Jugement rendu le 4 avril, 1863.

Les demandeurs, J. et O. Crémazie, marchands à Québec, poursuivirent le défendeur pour le recouvrement de \$114.

86, montant de leur compte pour effets et marchandises vendus et livrés par les demandeurs au défendeur depuis le 5 de janvier, 1861, jusqu'au 6 de novembre, 1862.

Le défendeur rencontra cette action par une défense au fonds en fait et une exception perpétuelle, par laquelle il plaidait :

Que, par un acte de cession fait à Québec, en novembre, 1862, les demandeurs, pour les causes mentionnées au dit acte abandonnèrent à John Ross et autres, tous leurs biens, dettes et effets généralement quelconques, entre autres toutes créances ou sommes d'argent dues ou à échoir, à eux dits demandeurs, soit en vertu de comptes, billets ou autrement.

Que le 3 de décembre, 1862, à la réquisition de John Ross et autres, la dite cession avait été signifiée au dit défendeur, par laquelle signification le défendeur était notifié que la dette due par le dit défendeur aux demandeurs, était devenue due et exigible par le dit John Ross et autres, les créanciers du dit défendeur.

Les demandeurs répliquèrent à cette exception, que l'action avait été portée au nom des demandeurs pour le profit et avantages des dits John Ross et autres, mentionnés en l'acte de cession allégué dans l'exception du défendeur ; que l'action portée au nom des demandeurs avait été ainsi portée à la réquisition des dits John Ross et autres, pour leur avantage et celui des créanciers des demandeurs.

A cette réplique le défendeur répondit en droit, s'appuyant des raisons suivantes :

“ 1° Parceque les dits demandeurs par leur réponse “ spéciale changent la demande contenue dans leur action.”

“ 2° Parceque la déclaration des dits demandeurs eut “ dû contenir l'énoncé des fait allégués dans la dite réponse “ spéciale, et qu'ils ne peuvent être admis à introduire dans

“ la cause, par leur réponse spéciale, des faits qu'ils auraient
 “ dû alléguer dans leur déclaration.”

“ 3° Parceque les faits allégués par la dite réponse spéciale ne sont pas de nature à affecter la dite exception.”

LARUE, pour les demandeurs :—Dit que les demandeurs avaient fait une cession de tous leurs biens à leurs créanciers, que ces derniers avaient fait signifier au défendeur ; que, plus tard, chargés par ces créanciers de porter une action contre le défendeur, ils l'avaient fait en leurs propres noms.

La prétention des demandeurs est que les cessionnaires avaient droit de se servir du nom de leurs cédants dans toute action portée contre leurs débiteurs.

Pothier dans son contrat de mandat dit :

“ Que le cessionnaire n'est que le mandataire du cédant et peut toujours faire usage du nom de son cédant.”

Jugement :—“ The Court having heard the parties by counsel *en droit* upon the merits of the *réponse en droit* filed by the defendant to the plaintiff's special answer in this cause : Considering that the said demurrer is not founded in law, doth overrule and dismiss the same, with costs.

LARUE, G. H., pour les demandeurs.

CASALT, LANGLOIS et ANGERS, pour le défendeur.

QUEEN'S BENCH, } DISTRICT OF MONTREAL.
 APPEAL SIDE.

Before:—DUVAL, Chief-Justice, MEREDITH, DRUMMOND
 and MONDELET, Justices.

THE ATTY. GEN. *pro* REGINA,

vs.

D'Aoust,

Held:—That in a case of felony no new trial can legally be had. | Jugé:—Que dans le cas de félonie un nouveau procès ne peut être accordé.

Judgment rendered the 9th June, 1866.

The following is a copy of the case sent by Mr. Justice Aylwin from the Court of Queen's Bench, criminal side, Montreal, to the Court sitting in appeal :

“ Upon an indictment for feloniously forging a certain indorsement of a promissory note, for the payment of the sum of three hundred dollars, with intent to defraud, and with a second count charging the defendant with uttering the said indorsement with intent to defraud, he was, on the 30th of March last, tried before the Honorable Mr. Justice Mondelet, at this Court, in Montreal, and found guilty.

“ On the 20th April last, upon a motion founded upon two affidavits, (of which motion and affidavits, together with the indictment, copies are annexed) the learned Judge ordered that the verdict should be set aside, and awarded a new trial.

“ On the 25th September last, Mr. Ramsay, on behalf of the Crown, moved that a day for the trial should be fixed.

“ Whereupon, being of opinion that I had no authority to take a second trial after the former verdict of guilty, I directed that the opinion of the Court of Queen's Bench, in appeal, should be asked :

“ Firstly:—Whether a second trial can be legally had, and :

"Secondly :—As to the course to be pursued, should there be no authority to take the new trial.

"I have now respectfully to ask the opinion of this Court, in respect of the premises, and have directed the defendant to be admitted to bail until the first day of the approaching term in appeal.

"Montreal, 25th September, 1865.

"(Signed,) T. C. AYLWIN, J."

MONDELET, Justice, dissenting :—Jean Bte. D'Aoust's trial came on before me, in the term of the Court of Queen's Bench, held in March, one thousand eight hundred and sixty-five, for forgery of a note for \$300, made on the 15th March, one thousand eight hundred and sixty-four, in favor of Joseph Desforges. At the trial I charged strongly against the accused, because the proof against him was of the clearest character, and the Jury found a verdict of guilty and recommended him to the clemency of the Court. The verdict was chiefly rendered on the evidence of Desforges, who swore distinctly that he never authorized D'Aoust to sign the said note.

On the 18th of April, in the same term, another trial for forgery, by d'Aoust, of a note for \$500, purporting to be signed by Desforges, dated the same day, took place, and the accused was acquitted, chiefly on the evidence of a witness named Legault.

This witness, who was not examined in the first case, stated distinctly at this trial, that on a given day, he was present and heard Desforges authorize the accused to make the two notes, and use and write his name as indorser. On being asked to account for his not having come forward to testify to that, on the first trial, Legault stated that he thought, all the time, that the case had been settled, and it was when, to his surprise, he was told that D'Aoust had been convicted, that he made known that D'Aoust had, in

his presence, been authorized by Desforbes to sign his name. On this evidence, I charged the Jury that, if they found that an express authority was given to sign the note, or that enough was said by Desforbes to justify D'Aoust in believing in good faith that the authority was given, then a verdict of guilty could not be found. The Jury gave a verdict of acquittal. A motion for a new trial, in the former case, was made on the 20th April, same term, by Mr. Ouimet, on the ground that the evidence of Legault would clearly establish that the authority to indorse the first note also, had been given, and that therefore, the accused was not guilty; that the verdict at the first trial, although warranted by the evidence then taken, was not warranted under the evidence given in the second case; in other words, that the evidence on the trial of the second case, was proof that the accused was not guilty of forging the note for \$300 for which he was tried in the first case.

The prosecuting officer for the Crown, Mr. Johnson, said that under the circumstances he should not oppose the motion for the new trial. "I feel, added Mr. Johnson, that the prisoner should have the opportunity afforded him of adducing the same justification as in the case now before the Court."

The question then arose: Should the new trial be granted? I thought it should; that justice imperatively demanded it; that the Court of Queen's Bench had power to grant it, and accordingly, I ordered a new trial to take place.

The learned Judge who held the Court for a few days, at the next term, did not proceed with the trial, but referred the case to this Court. It is the opinion of the other Judges that I was wrong in granting a new trial. There being four on one side, and but one on the other, it might be presumed that being in such a minority I am wrong. But I am not convinced I am so by the reasoning

of my learned *confrères*. I am of opinion that there was no case here which could be reserved; the law has not provided for such a case. Taking it for granted, however, that this Court is legally seized of the case, which I cannot admit, I proceed to the discussion of the point reserved.

I start from this:—There must be in the Court of Queen's Bench a power inherent in itself to remedy such an evil as has arisen in this case, a power to prevent the Court from using its authority to sentence and punish as guilty a person whom it believes to be innocent, a power to provide for the case of new evidence being discovered on the trial of a similar offence as in this case; evidence which if adduced in the former trial, or on a new trial, would conclusively establish the prisoner's innocence. No statute can be cited taking away such a power, or declaring it illegal.

It is said, the Jurisprudence in England has not established that a new trial can be delivered in case of felony although it has done so in cases of misdemeanour. This Jurisprudence, in the case of misdemeanour, creates a presumption in favor of the power of the Court to grant new trial in cases of felony. Was there any statute to authorize the granting of new trials in cases of misdemeanour? None has been cited, or alleged to exist, nor do I believe that any such statute can be found. The *first* new trial on misdemeanour was therefore granted without the authority of any statute,—this is taken for granted and admitted on all hands.—But under what power? Clearly from the inherent power of the Court.—It was not granted in defiance of a statute, but from the power of the Court to administer justice in each case, from its being the duty of the Court to do so. And, if in the one case, why not in the other? Why should the Court, in the case of a misdemeanour, grant a new trial, and not in a case of felony? Why remedy an evil which is small, and operates but little injustice, and not also remedy a greater evil, which is of the gravest kind, and operates the highest injustice and

evil? Why give a remedy in case of an assault and refuse to admit new found evidence to save the life of a man; discovered now to be innocent, but against whom a verdict of guilty was rendered some time since, without such new evidence. A writ of error cannot be had in such a case. A person is found guilty of felony perhaps after the gravest doubt. Then comes the most convincing and clearest proof that the prisoner was not guilty, and could not have been guilty; that it was another who was guilty; and is the innocent man to be sentenced to death because no Judge ventures to make a precedent giving a new trial in case of felony? Why should a man convicted of giving a slap to an other, get a new trial and escape a small fine or a few days imprisonment, and an innocent person not get a new trial to save his life, when the statute law is equally silent in both cases?

If there be no precedent of granting a new trial in case of felony, why not make one, if there be nothing in a statute to prevent it? Does not the Superior Court invariably apply a remedy for any evil in civil cases, provided there be no law to prevent it? Why? Because it has, it must have, an inherent power to do justice. If an evil so grave is found in a criminal matter as in this case, if the prisoner is really innocent, and the new evidence discovered must establish that innocence, why not do away with the evil by adopting the easy remedy by new trial, introduced in cases of misdemeanour, without a statute, it is true, but not contrary to a statute, when justice imperatively calls for such a remedy?

It is said there would be no finality in criminal cases, every body would want a new trial, Courts would never be able to hang any one, till after repeated trials. This seems to me no reason at all. Courts should not be able to sentence any one to death when proofs of innocence, not previously adduced or known, are to be had, to shew the innocence of the accused. Courts are not to hang

first, and try and judge afterwards. In civil cases, the same inconvenience might happen. New trials are constantly granted when justice requires it, and according to fixed and settled rules, and if justice demands a new trial in cases of felony, such trial could be granted, but only when the Court saw the justice of granting it, and according to the particular circumstances of each case. And are inconvenience and delay to be compared with a total failure of justice in the case of innocent persons?

It is said, new trials in cases of felony have not been adopted in England but have been refused. That is true until lately. But that does not prove that having been so long refused, they should continue to be refused for ever. Many changes have been made in England in favor of justice, even at the expence of precedents long continued, and supposed to be venerable. There was a time when a counsel in cross-examination was confined to the points touched on in the examination in chief. This has been relaxed, and the witness for one party called up to prove a single fact, may be cross-examined and be made a witness for the other party on the whole case.

Until 1824, when Chief-Justice Best set his face against unlimited protection to witnesses, when called upon to testify to their own turpitude, the witness was not in such a case held bound to answer, but the newer and better rule has been adopted that he shall answer unless his answer would expose him to some corporal punishment.

Chief-Justice Coke was held by some to have doubted whether a jury which could not agree on their verdict could ever be discharged. Whether meat or drink could legally be given to them, whether they should be allowed any mattress or whether they should be starved into unanimity. This was all changed. Jurors were not now to be carted from one county to another. Humanity relaxed the rule, and common sense approves of such a relaxation, for

although Courts should not, without strong and sufficient ground, discharge jurors who do not agree, yet Courts cannot force an agreement or a verdict, but they may prevent scandal by the relaxation of the rule, which, if it were the rule, was surely quite too rigid to be always followed.

It was said that in the exceptional cases of innocence, recourse should be had to the Executive ; that the prerogative of mercy would be interfered with. Doctors differ, but I think innocent men should not be forced to go on their knees guilty men may do so. Why should a man really innocent, and who has the clearest proof in his hands that he is so, go before the Attorney General, or the Executive Council, or the Governor, and say : " I am not guilty, therefore pardon me." No man should be placed at the mercy or caprice of another in such a case. Of course I do not allude to any officials in particular, past, present or future. But suppose the Executive or an Attorney General, for some reason, or without reason, would not interfere. The Court, we are told, cannot interfere, because it is never done in England. What is to be done then ? Is the prisoner who has been found guilty without evidence or against evidence, or with clear proof, since discovered, of his innocence, to be sacrificed ? Is he to look perhaps to political enemies for a pardon, innocent as he may be ? Is he to be content with the stereotyped answer : " Your case will be taken into consideration ?" When that consideration may be that the sheriff gets ready the rope to hang him ! Putting this extreme case, will test the evil, and the remedy, I think, ought to be that which in civil cases is always given and in minor criminal offences, namely, a new trial. I believe the Court of Queen's Bench, in Lower Canada, has the power of granting a new trial, and in fit and proper cases, I would, speaking for myself, grant it.

It is said that in England the Parliament would not sanction a law to permit new trials in cases of felony. In

Upper Canada: such a law exists, and it is enforced from the fact of a law being passed to that effect, that a statute was necessary, and that in Lower Canada such a statute should be obtained. Now, I look upon a statute as not necessary, in this case; that one was passed is easily accounted for, it was to put an end to all doubt, to relieve Judges of responsibility. But if it exists in Upper Canada by statute, that does not shew that the Jurisprudence in England, which is only of a negative kind, and upon which Jurisprudence the majority of the Court relies, is binding or based on justice, or sound principle. I think, and it is my firm and decided opinion, that if the Court of Queen's Bench is not forbidden by statute to grant new trials in case of felony, if the Court has the inherent power to grant it, and if justice and right require, it should be granted. There is no danger of its abuse.

I am convinced that, in the present case, justice required that a new trial should be granted; and I granted it on that account, and because I considered the Court was empowered to grant it. This Court is about to determine otherwise, and to hold that in not proceeding with the new trial, Mr. Justice Aylwin acted in accordance with law, but I do not acquiesce in the judgment about to be rendered. (1)

(1) In the Edition of Russell on Crimes and Misdemeanours, edited last year by Charles Sprengel Greaves, Q. C., the law on the subject is thus stated:

“When the defendant has been convicted on an indictment either for FELONY (*) or for misdemeanour a new trial may be granted at the instance of the defendant, where the justice of the case requires it.”

The dictum of Lord Kenyon which was considered as conclusive against granting a new trial, was not a decision, but Lord Campbell's decision actually granting a new trial is stated by Greaves, (the best criminal Lawyer in England) as well as in the last edition of Archbold, to be the present law in England.

It is to be observed this is not in virtue of a recent statutory enactment which could be said to be no law in Canada, but, from the power of the Court of Q. B., to grant a new trial “where the justice of the case requires it.”

(*) *Regina vs. Scalfs*, vol. 3, p. 213 :—2 Denison, OC. 281.

MEREDITH, Justice:—The first point to be considered in this case, is as to whether the main question submitted to us, is one which, under the statute, could be reserved for our opinion. Upon this subject there has been much difference of opinion upon the Bench in England; and as all the arguments on the one side, and on the other, with respect to what questions may be reserved, will be found in the well known case of the Queen vs. Mellor. (1) I shall limit myself to a brief statement of the reasons which induce me to think that the question reserved is one which we have power to consider.

The words of the law are very general: "The Court before which the case has been tried, may in its discretion reserve any question of law, which has arisen on the trial, for the consideration of the Court of Queen's Bench, on the appeal side thereof." There can be no doubt that the question: "Can there be a new trial in a case of felony?" is a question of law. And I think that question may be said to have arisen "on the trial," because, to repeat the words made use of by Baron Rolfe (now Lord Cranworth) "In the case of the Queen vs. Martin (2) the word "trial" ought to be taken in a liberal sense, and includes all the proceedings in the Court below." In the case just cited, the Court for Crown cases reserved, composed of Wilde, Chief-Justice, Wightman and Creswell, Justices, and Rolfe and Platt, Barons, unanimously held, that a question of law raised by motion in arrest of judgment, *after the conviction* of the prisoner, may be reserved under the 11th and 12th Vict., c. 78, that being the English Act establishing a Court for Crown cases reserved. (8)

The first question submitted to us by the learned Judge is whether a second trial can be legally had in the present

(1) Dearsley and Bell, p. 468.

(2) 3 Cox., C.C., p. 45, 30th April, 1849.

(3) See also the Queen vs. Webb, 1 Temple and Mew, p. 23:—and 5 Cox, 183. Dec. 9th 1848; but see also an Irish case, Regina vs. Byrne, 4 Cox 248, June 24th 1858:—and 1 Cox, p. 3.

case, it being a case of felony; and I think that this highly important question may, at this day, be answered in very nearly the same words used by Chitty half a century ago, namely: "In a case of felony or treason, it seems to be "completely settled that no new trial can be granted." (1)

There is, it is true, one case, the *Queen vs. Scaife*, in which a new trial was granted in a case of felony. I have looked into several reports of this case, (2) and they all concur in showing that it was argued and decided exclusively on the ground that certain illegal evidence had been received, not one word was said about the difficulty of allowing a new trial in a case of felony until all the Judges had given their reasons in support of the judgment. But, then, Mr. Dearsley, the counsel for the prisoner, "suggested that "there was a difficulty in ascertaining what rule should be "drawn, no precedent having been found for a new trial "in a case of felony." To which Lord Campbell answered: "That might have been an argument against our hearing "the motion." Now it seems to me that: "if it might "have been an argument against the hearing of the motion," it might also have been an argument for the reconsideration of the judgment.

It may here be observed that the case just cited had been removed by *certiorari* from the Quarter Sessions to the Court of Queen's Bench, and it appears that when this is done, according to English practise: "The charge is "dealt with at the civil side of the Court, and is subject "to all the incidents of a civil cause. (3) M. Dearsley, who from what I have already said, appears to have been the counsel for the prisoner, refers to this case in his small work, called: "Criminal Process," and after saying "all

(1) Chitty's *Crim. Law*, p. 654, where the author cites 6, T. R. 625, 638:—13th East, 416 N. A.

(2) The case is reported 2 Denison, C. C., p. 281:—17th Ad. and Ell., N. S. p. 239:—79 vol., E. C. Law Rep., p. 237; and 5 Cox, C. C., p. 243.

(3) See discussion in House of Commons. 1 Feb. 1860, on "Appeal in Criminal Cases Bill."

"the authorities in the books go to shew that in cases of felony, or treason, no new trial in any case can be granted," adds: "though this position is for the most part correct, it must be received with some qualification." He, then, referring to the decision of the Queen vs. Scaife, says: "And the principle seems to be this: 'That where such a case is removed into the Court of Queen's Bench and is sent down to be tried at *nisi prius*, all the incidents of (1) a trial at *nisi prius* attach to it.'"

This much is plain, that whatever may be the rule with respect to cases moved by *certiorari* into the Queen's Bench, it seems certain that the rule with respect to cases tried in the ordinary course of law was, when the criminal law of England was extended to this country, and still is, that there cannot be a new trial in cases of treason and felony.

Repeated attempts have been made in the Imperial Parliament to change the law: "So as to grant to prisoners tried and convicted of felony in the Court of Queen's Bench the same right of appeal as was enjoyed by persons convicted of misdemeanour," the grievance complained of being: "That if the conviction was one for *felony* NO NEW TRIAL could be obtained." And those attempts have invariably been resisted, not on the ground that the law was not as stated by those who sought a change, but, on the contrary, on the ground that the change proposed would not be an improvement. It is true that in Upper Canada the distinction between misdemeanours and crimes of greater magnitude has been done away with, in so far as regards the right to obtain a new trial; but this has been done by statute, and if legislation for that purpose was necessary in Upper Canada, it is still more necessary here; for it is plain that if an application for a new trial were allowed, it ought to be made to the Court of Queen's Bench sitting in appeal, held by at least

(1) Dearsley, *Crim. Process*, pp. 71, 72.

four Judges, and not to the Court of Queen's Bench on the Crown side, usually held by one Judge. (1) And it is equally plain that under the existing law, such an application could not be made to the Court of appeals.

It is not for this Court to decide whether it is desirable to change our law, so as to admit of new trial in cases of treason and felony. I admit that it is difficult in theory to answer the arguments that have been urged for giving a party, in cases of the utmost moment, a right that is freely accorded to him in cases of much less importance ; but no one who has had experience in the working of criminal Courts can fail to see that there are practical objections of great gravity against the making of the change proposed. The Imperial Parliament, upon several occasions, has been called upon to consider this subject, and the opinions of almost all the Judges were obtained in relation to it. Sir Cornwall Lewis, the Secretary of State for the Home Department, in the course of his answer to Mr. McMahon, observed : " In the year 1848, a committee of the House " of Lords was appointed to consider a bill, which was " called the criminal Law amendment Bill, when two of the " Judges, Mr Baron Parke and Mr. Baron Alderson, both " eminent for their knowledge of the criminal law, were " examined on the question to which the present bill " referred. Lords Lyndhurst, Broughman and Denman " were also examined before the committee, and further the " evidence of Baron Parke and Baron Alderson was sent " round to all the Judges, and their opinions with regard " to it were requested. What was the result ? Baron " Parke and Baron Alderson had stated very decidedly their " opinion as against an appeal in criminal cases, and their " conclusion was confirmed without the slightest modification by Lords Denman, Lyndhurst and Broughman. " At the same time the following Judges concurred with " their Lordships by written communication, namely: Mr.

(1) Vide *Regina vs. Bruce*, 10 L. C. Rep., 117

"Justice Patteson, Mr. Justice Coleridge, Mr. Justice Wightman, Mr. Justice Erle, Mr. Justice Coltman, Mr. Justice Maule, Mr. Justice Cresswell, Ch. Baron Pollock and Mr. Baron Rolfe. In addition to that, the testimony of Mr. Sergeant D'Oyley, was against any change, so that, with the exception of Mr. Green and Sir Fitzroy Kelly, all the witnesses were of opinion that the appeal ought not to be allowed." We know that the bill which was introduced by Mr. McMahon in Feb. 1860, for the establishment of a Court of criminal appeals, the main object of which was to give a new trial in cases of treason, and felony, was not allowed to be read a second time, and was rejected without a division; and that the same fate attended a bill introduced by Mr. Butt, for the same purpose, in May, 1861. Our law on this subject is the law of England, and in the absence of Provincial Legislation, I think it would be nothing short of an usurpation on our part, were we to attempt to exercise a power which the Imperial Parliament has deliberately and repeatedly refused to grant to any Court in England. For these reasons I am of opinion that the first question submitted to us by the learned Judge, ought to be answered in the negative.

The second question proposed is: "As to the course to be pursued, should there be no authority to take the new trial." This it seems to me, I say it with all deference, is a question to be determined by the learned Crown prosecutor; and were we to answer it, I apprehend we would in effect, offer that learned officer advice for which he has not asked, and by which he might not deem it consistent with his duty to be guided. I therefore submit that it will be well for us to abstain, for the present, from the expression of any opinion upon the second question submitted.

DRUMMOND, Justice:—Stated in effect his regret at being called upon to discuss a question like that now before

the Court, to discuss matters well settled already and about which he had long ago arrived at a settled conviction. In his earliest study of the criminal law, the anomaly had struck him, as no doubt most others, why it was that in cases of misdemeanour a new trial could be had, but not in cases of felony, why it was that for a trifling offence a criminal might have a second chance of escape, but not where his life was in danger. He had made attempts, more than once, to press the Judges for a new trial in cases of felony, but was met in such a way, on the second occasion, that he had not again attempted it, nor had he any knowledge of its being attempted till after the judgment of Lord Campbell, already referred to. In the case of McCorkill, on a motion in arrest of judgment and for a new trial, he had called the attention of the Court to Lord Campbell's judgment, but the then Chief-Justice only shrugged his shoulders, and Mr. Justice Aylwin would not listen to any application for new trial.

He was quite satisfied no such trial in a case of felony could be had; he rested his opinion on the law and the practice of law as settled ages since, and as it was transplanted into this colony after the conquest of the country by England. He could not for a moment entertain the notion that our criminal law consisted solely of what was declared by statute. If this were so, Courts of criminal law might be closed at once, for, in fact, criminal law rested largely on the common law. It is argued that if there be no statute forbidding a new trial in cases of felony, the Court may grant it. But this would be little less than allowing a Judge to do what he pleased where no statute interfered, to look not at what the law is, but what it ought to be according to his view, and to decide from his own notions of justice, or of what would benefit the subject. This would be making a Court or Judge equal to the Legislature. He was not prepared to justify such a course, but would follow the law and practice of the Courts.

The question was not where is the law which forbids a new trial in cases of felony, but where is the law that allows it? He knew of none, and could not enter upon the question whether such a law would or would not be, on the whole, beneficial. A great deal might be said on both sides of the question, in a philosophical point of view, but he considered it wholly out of place for Judges, who had to administer law *as it is*, to enter upon such a discussion. This Court had only to interpret the law as it exists, and to administer it. It was not in its province to discuss the effect of changes in the law, as if the Court had power to make changes, or to decide upon whether they would or would not be advantageous to the public.

As to the question what the Judge should do with this case when it might come up for trial, this Court gave no order, but the majority were of opinion that Mr. Justice Aylwin had acted rightly in refraining from proceeding with the new trial.

DUVAL, Chief-Justice :—The sole question in this case is as to whether a new trial can be granted in a case of felony or treason. It has had but one answer, and that in the negative, by the judicial decisions and practice of centuries in England. The Parliament of England refused to alter the criminal law, so as to give such a trial, and by what right can a Court or Judge here pretend to grant what is unknown to the law. That it is unknown is a sufficient reason for us not to grant it, and not to alter or add to the law. The decision of Lord Campbell referred to, is the one solitary case tending to support the doctrine of such a trial being granted, and that was in opposition to the uniform current of authority. It is a decision which neither writers nor Judges have professed to understand, and which has never been followed. The statute of 1794 did not give unlimited authority to our Courts as now pretended. On the contrary, the Legislative powers

exercised by certain Courts in France were not granted to them, and if not granted, cannot be legally exercised, from any supposed failure of justice by the law as it stands, or from supposed benefit to arise from the introduction of the new practice contended for.

The argument which says if a new trial is granted in a case of misdemeanour, why not in a case of felony, is entitled to very little weight. For there are plain and well established distinctions between the two classes of offences, and the Courts have recognized and acted upon these distinctions. Blackstone tells us, that a misdemeanour is more like a civil, than a criminal proceeding; the accused is a defendant. He appears and pleads by counsel; trial may be had in his absence, and judgment pronounced in his absence. The term *félonie* although by some derived from the Anglo-Saxon, in reality implies a forfeiture and was well known to the feudal law. But without dwelling on the distinction known by every Lawyer between misdemeanour and felony, it is enough for us that in the one case a new trial has been often granted, and not in the other. To abolish these distinctions, or to grant new trials in both cases, may be, or may not be, wise. It is for the Legislature to settle that point. But for a Court or Judge legally to do so, power must be given and not assumed. If a Judge can make law, a Legislature is not necessary.

With respect to the *dictum*, said to be Lord Coke's, that a jury could not be discharged, no such *dictum* in this unrestricted sense was laid down by Lord Coke. He only gave the general rule that once empannelled, a jury could not be discharged without rendering a verdict: that is to say, there must be good reason for the discharge.

As to cross examining witnesses, the true doctrine held was not that the cross-examination could only touch upon points in the examination in chief, but in certain cases, to avoid confusion, Judges required the evidence as to special

points to be taken continuously and in a certain order, as for instance, items in an account must be gone into separately, so that the jury could understand the items as they were proceeded with. But the witness was still liable to examination on the whole case. The mode of doing so was discretionary with the Judge. It was part of what we call the *instruction du procès*, and a wise and useful rule, not lately laid down as we have been told.

As to the amount of protection to be claimed by a witness, differences of opinion had existed in England, some Judges going further than others in compelling answers. But what was the consequence? The Legislature interfered and witnesses were protected not by Judge made law, nor by the omnipotence of Courts, but by the statute.

These changes introduced into the modes of procedure in England could have no bearing on the question at issue in this cause and ought not to have been mentioned. He had asked, during the previous term, where was the law to be found allowing a new trial in cases of felony? None had been cited.

Many reasons of public policy might be urged for keeping the law as it is, and letting well alone. He was struck with a remark that perhaps the accused had a better chance under the present law than if exposed to a second or third trial. However that might be, he, as a Judge, could not make a law granting a new trial, and if he were called upon as a legislator to express an opinion, he should vote against it.

The majority of the Court, therefore, are of opinion that Mr. Justice Aylwin was right in not proceeding with the trial. On the second point, no opinion would be expressed.

Judgment:—After hearing counsel, as well on behalf of the prisoner as for the Crown, and due deliberation had

on the case transmitted to this Court from the Court of Queen's Bench, sitting on the Crown side, at Montreal, it is considered, adjudged and finally determined by the Court now here, pursuant to the statute in that behalf, that a second trial cannot be legally had on the indictment found against the prisoner Jean-Baptiste D'Aoust.

Dissentiente : — The Honorable Mr. Assistant-Judge MONDELET.

RAMSAY, T. K., *pro* Regina.

OUMET, for D'Aoust.

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OF THE

PRINCIPAL MATTERS.

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Held:—That in a case of collision the vessel in a position contrary to rule, cannot claim damages suffered from such collision.

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Black, et al, and Lefebvre.

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Held:—That after the acceptance of certain works about the building of a church, &c., those who have caused the building thereof cannot complain of the defects therein, that do not result from defects of the ground, *vices du sol*, unless there be fraud or deception.

Jugé:—Qu'après la réception d'ouvrages de construction d'une église, etc., ceux qui les ont fait construire ne peuvent se plaindre des défauts qui n'y rencontrent, qui ne dépendent pas des vices du sol, à moins qu'il n'y ait dol ou surprise.

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Held:—That the fact of one of several appellants having paid part of the taxed costs upon the judgment appealed from, does not raise a presumption of *acquiescement* on his part, although he has made no reserve or protestation at the time of payment.

Jugé:—Que le fait qu'un de plusieurs appelants a payé partie des frais taxés sur le jugement dont est appel, ne peut faire présumer acquiescement de sa part, quoiqu'il n'ait fait aucune réserve ou protestation lors de tel paiement.

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Held:—That although the following of the art of photography is carrying on trade, nevertheless, the engagement of a party to whom the photographer pays a salary, at the same time that he instructs him in the art, cannot be considered as a commercial contract; and that, therefore, to be admitted to prove such engagement and contract by parol evidence, a *commencement de preuve par écrit* is necessary.

Jugé:—Que quoiqu'en exerçant la photographie l'on fasse acte de commerce, néanmoins, on ne peut pas considérer comme acte de commerce l'engagement d'un employé auquel le photographe paie un salaire, tout en lui enseignant l'art de la photographie; et que, par conséquent, pour être admis à prouver tel marché ou contrat d'engagement par témoins, il faut un commencement de preuve par écrit.

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ACTION EN NULLITE.—*Vide* ADJUDICATION PAR SHERIF.

ACTION HYPOTHECAIRE.

In an hypothecary action brought by Renaud against Proulx, holder of an immoveable hypothecated by Pâquin, for a debt due by him to the firm of Renaud and Brother, to which the plaintiff belonged. The partnership having been dissolved and the plaintiff become proprietor of all the debts due to the partnership:

Held, in the Superior Court:—

1o. That the sole effect of an hypothecary action is to have the defendant, holder of an hypothecated immoveable, condemned to abandon it, and that the creditor has no personal recourse against the holder of the immoveable, in default of his abandoning the said immoveable.

2. That the conclusion of the action praying that the holder be condemned to pay the amount of the mortgage against the said immoveable, unless he prefer abandon it, *délaisser*, are illegal and vicious conclusions.

3o. That in the present cause, the transfer of the assets of the partnership to Renaud, the plaintiff, ought to have been intimated to Pâquin, the personal debtor, who had given the mortgage.

4o. That it is necessary in an hypothecary action to prove that at the time of the passing of the act, which created the mortgage, the party who gave such a mortgage was really proprietor of the immoveable, and that the holder derived his title from such proprietor.

In Appeal:—That the plaintiff was bound to prove, so as to succeed in his action, that Pâquin was, at the time of the obligation, proprietor of the immoveable which he had mortgage and that the absence of such a proof must cause the action to be dismissed.

Renaud et Proulx.

Dans une action hypothécaire intentée par Renaud contre Proulx, tiers-détenteur d'un immeuble hypothéqué par Pâquin, pour une créance par lui due à la société Renaud et Frère, dont le demandeur faisait partie. La société ayant été dissoute et le demandeur étant devenu propriétaire de toutes les créances de la société:

Jugé, en Cour Supérieure:—1o.

Que le seul effet d'une action hypothécaire est de faire condamner le défendeur tiers-détenteur à délaisser l'héritage hypothéqué, et que le créancier n'a aucun recours personnel contre le tiers-détenteur à défaut par lui de délaisser l'immeuble.

2o. Que des conclusions demandant que le tiers-détenteur fut condamné à payer le montant pour lequel l'immeuble était hypothéqué, si mieux il n'aimait délaisser, sont des conclusions vicieuses et illégales.

3o. Que dans cette cause l'acte de cession ou transport des biens de la société, au demandeur Renaud, aurait dû être signifié au débiteur personnel Pâquin, qui avait consenti l'hypothèque.

4o. Qu'il est nécessaire de prouver dans une action hypothécaire que lors de la passation de l'acte comportant hypothèque, celui qui consentait telle hypothèque, était réellement propriétaire de l'immeuble et que le tiers-détenteur dérive son titre de tel propriétaire.

En Appel:—Que le demandeur devait nécessairement prouver, pour réussir dans son action, que Pâquin était, au temps de l'obligation, propriétaire de l'immeuble sur lequel il avait donné une hypothèque et que le défaut de telle preuve devait faire débouter l'action.

476

AFFIDAVIT.—SAISIE ARRÊT.

Held:—1o. That an affidavit for *saisie-arrêt* before judgment in an action for money paid, laid out and expended, and lent and advanced by the plaintiff to the defendant, and at his request, is bad for not distinctly stating that the money paid, laid out and expended was so paid, &c., to the use of the defendant, and at his request.

2o. That where an affidavit for the issuing of a *saisie-arrêt*, embraces several causes of action and one of them is defectively stated, it vitiates the whole affidavit.

Maguire vs. Link.

Jugé:—1o. Qu'un affidavit pour *saisie-arrêt* avant jugement dans une action pour argent payé et dépensé, et prêté et avancé par le demandeur au défendeur, à sa réquisition, n'est pas valable s'il n'est pas distinctement allégué que l'argent payé, prêté et avancé a été ainsi payé; etc., pour l'usage du défendeur, et à sa réquisition.

2o. Que lorsqu'un affidavit pour *saisie-arrêt* embrasse plusieurs causes d'action, et que l'une d'elles n'est pas suffisamment énoncée, tout l'affidavit se trouve vicié.

372

AFFIDAVIT.—*Vide* CAPIAS AD RESPONDENDUM.—EXCEPTION A LA FORME.—JURIDICTION.—PROMISSORY NOTE.—*QUE WARRANTO*.

ALIMENTS.—OBLIGATION DE FOURNIR.

Held:—1o. That grand fathers and grand mothers are bound to furnish sustenance to their grand children who are poor and in infancy.

2o. That, in the case submitted, the action of the plaintiff was properly brought against the defendants.

Resche vs. Ratté, et al.

Jugé:—1o. Que les grand pères et grand'mères doivent des aliments à leurs petits enfants en bas âges et indigens.

2o. Que, dans l'espèce, l'action de la demanderesse était bien dirigée contre les défendeurs.

413

ALIMENTARY ALLOWANCE.—*Vide* DECLARATION DE PATERNITÉ.

ANTICHRESE.—BAIL.

Held:—That a covenant containing *antichrèse*, made under the operation of the act of 1853, ch. 85, sec. 1, must be maintained, and that, in the case submitted, such covenant, having the effect of a lease, until repayment of the principal, there could be no *tacite réconduction* from year to year, so as to cause a presumption of delay for payment of the principal.

King vs. Conway.

Jugé:—Qu'une stipulation contenant *antichrèse*, faite sous l'opération de l'acte de 1853, ch. 85, sec. 1, doit être maintenue, et que, dans l'espèce, cette stipulation devant avoir effet comme bail, jusqu'au remboursement du principal, il n'y avait pas lieu à la *tacite réconduction* d'année en année, de manière à faire présumer un délai pour le paiement du principal.

401

APPEAL.—BILL OF COSTS.

Held:—That there is no appeal to the Court of Review from a judgment taxing a bill of costs amounting to less than twenty-five pounds.

Brown and Lowry.

Jugé:—Qu'il n'y a pas appel à la Cour de Révision d'un jugement taxant un mémoire de frais à une somme de moins de vingt-cinq louis.

410

APPEAL.—CONTRAINTES PAR CORPS.

Held:—That there is no appeal to Her Majesty in Her Privy Council from a judgment for a sum of \$40, although, in default of payment of such judgment, the respondent was subjected to the *contrainte par corps* until such time as such judgment would be satisfied.

Pacaud et Roy.

Jugé:—Qu'il n'y a pas appel à Sa Majesté en son Conseil Privé d'un jugement condamnant à une somme de \$40, quoique, faute de satisfaire à ce jugement, l'intimé fut condamné à la contrainte par corps jusqu'à ce qu'il eut ainsi satisfait au dit jugement.

399

APPEAL.—INTERLOCUTORY JUDGMENT.

Held:—1o. That when an opposition *afin d'annuler* is not stamped according to law, the Court will, upon motion of the plaintiff, give leave to proceed to the sale of the effects seized, notwithstanding such opposition.

2o. That it is only by means of an appeal, or of a *requête civile*, (as the case may be) and not by means of an opposition *afin d'annuler*, that the reforming or setting aside of an interlocutory judgment or order can be obtained.

Gibson vs. Jamieson, et vir, and Healy.

Jugé:—1o. Que lorsqu'une opposition *afin d'annuler* n'est pas revêtue des timbres exigés par la loi, la Cour permettra, sur motion du demandeur, de procéder à la vente des effets saisis, nonobstant telle opposition.

2o. Que ce n'est que par voie d'appel, ou par une *requête civile*, (suivant le cas) et non par une opposition *afin d'annuler*, qu'on peut demander et obtenir la réformation ou l'annulation d'un jugement ou ordre interlocutoire.

351

INTERLOCUTORY JUDGMENT.

Held:—That there is no appeal from an interlocutory order at *enquête*, maintaining the objection of the plaintiffs to the hearing of the husband of the defendant as a witness.

Jugé:—Qu'il n'y a pas lieu à appel d'un jugement interlocutoire à l'enquête, maintenant l'objection des demandeurs à l'audition du mari de la défenderesse comme témoin.

The Ontario Bank vs. Duchesnay.

194

INTERLOCUTORY JUDGMENT IN REVIEW.

Held:—That interlocutory judgments subject to appeal can alone be inscribed for review.

Young vs. Baldwin.

Jugé:—Que des jugements interlocutoires ceux seulement dont l'appel est permis sont sujets à révision.

242

INTERLOCUTORY JUDGMENT.

Held:—1o. That prescription does not run between man and wife.

2o. That the legacy *en usufruit* by a man to his wife does not make the latter lose her recourse against her husband or his heirs for *reprises matrimoniales*, and that confusion does not exist in such case.

Ménétier dit Morochond and Gauthier.

Jugé:—1o. Que la prescription ne court pas entre époux.

2o. Que le legs *en usufruit* par un mari à sa femme n'éteint par le recours qu'avait cette dernière contre son mari ou ses héritiers pour *reprises matrimoniales*, et qu'il n'y a pas confusion en ce cas.

181

APPEAL.—PRACTICE.

Held:—That there is an appeal to the Court of Queen's Bench, from decisions of the Superior Court, upon review of orders of the provincial arbitrators.

Jugé:—Qu'il y a appel à la Cour du Banc de la Reine, des décisions en Cour Supérieure, sur révision des sentences des arbitres provinciaux.

Le Proc.-Géné, pro Regina, et Elliee.

64

PRACTICE.

Held:—That there is no appeal from judgments rendered by the Circuit Court under the provisions of the Con. Stat. L. C., cap. 24, sec. 67, respecting municipalities and roads in Lower-Canada.

Jugé:—Qu'il n'y a pas appel des jugements rendus par la Cour de Circuit en vertu des dispositions du Stat. Ref. B. C., chap. 24, sec. 67, concernant les municipalités et les chemins dans le Bas-Canada.

Groulx et la Corporation de la paroisse de Saint-Laurent.

170

ARCHITECTE.—PAIEMENT D'UN.

Held:—That an Architect cannot at one and the same time be employed by the proprietor and builder and receive pay from both; and that the fact that the Architect has conventioned with the builder to receive payment from him, is sufficient to discharge the proprietor.

Jugé:—Qu'un architecte ne peut être employé par le propriétaire et le constructeur en même temps et recevoir rémunération des deux; et que le fait que l'architecte est entré en convention de recevoir une rémunération du constructeur, est suffisant pour libérer le propriétaire.

Tahrland et Rodier.

473

ARGENT PRÊTÉ.—*Vide* APPEAL.—BANK MANAGER.—INTERLOCUTORY JUDGMENT.

ARTICULATION OF FACTS.

Held:—That an articulation of facts in the words: "Is it not true that the allegations, matters and things set forth in the plaintiff's declaration in this cause filed, are true and well founded in fact," will be rejected with costs, as being no articulation of facts under the statute, and as insufficient and irregular.

Jugé:—Qu'une articulation de faits comme suit: "N'est-il pas vrai que les allégations, matières et choses énoncées en la déclaration du demandeur, enfilée dans cette cause, sont vraies et bien fondées en fait," sera rejetée avec dépens, comme n'étant pas une articulation de faits suivant le statut, et comme insuffisante et irrégulière.

Day vs. Hart.

397

ASSIGNEE.—RIGHT OF AN

Held:—That the assignee has the right of using the name of his assignor and to bring suit in the name of such assignor.

Jugé:—Que le cessionnaire a droit de se servir du nom de son cédant et de porter son action au nom de tel cédant.

Crémazie, et al, vs. Cauchon.

462

ASSIGNMENT.—*Vide* INSOLVENT ACT.—SEPARATION DE BIENS.—
PRACTICE.

ASSIGNOR.—*Vide* ASSIGNEE.

ATTORNEY.—*Vide* FACTUM.

ATTORNEY AD LITEM.

Held :—That payment of costs to an attorney *ad litem*, who had not obtained *distriction de dépens*, and who had no special authority to receive them, is nevertheless valid.

Jugé :—Que le paiement de dépens à un procureur *ad litem*, qui n'avait pas obtenu *distriction de dépens*, et qui n'avait aucune autorité spéciale pour les recevoir, est néanmoins valable.

Young vs. Baldwin.

70

AUCTION SALE.—*Vide* TROUBLE.—GARANTIE DE TROUBLE.

AUTORISATION MARITALE, POUR CONTRAT.

Held :— That a contract by a married woman, without marital authority, given and shewn in the deed containing the contract, is invalid.

Jugé :— Qu'un contrat par une femme mariée, sans autorisation par le mari, donnée par l'acte même contenant le contrat, n'est pas valable.

Renunciations by children to the future successions of their parents, valid and presumed made for the advantage of the other heirs binds the renunciants.

Les renonciations des enfants aux successions futures de leurs parents, valables et présumées faites pour l'avantage des héritiers lient les parties renonçant.

In principle renunciations to future successions of living persons, ineffective, except in marriage contracts of female children.

En principe les renonciations aux successions futures de personnes vivantes, sont inefficaces, si ce n'est dans les contrats de mariage.

In this case, the *acte* of donation and last will made by the testatrix set aside as made by fraudulent captation and suggestion of the parties claiming to hold the estates thereunder.

Dans l'espèce, l'acte de donation et le testament faits par la testatrice déclarés nuls pour cause de captation et suggestion frauduleuses des parties réclamant les successions en vertu d'iceux.

The said parties having received and held the mass of the estates referred to ordered to account for the same.

Les dites parties s'étant mises en possession de la masse des dites successions condamnées à rendre compte d'icelles.

Crevier dit Bellerive, et al, and Rocheleau, et al.

328

BAIL.—*Vide* ANTICHRESE.

BAILIFF.—WRIT ADRESSED TO.—*Vide* JURIDICTION.

BANK MANAGER.—HABILITY OF.

Held :—1o. That a bank manager cannot lawfully lend the money of the bank to a company in which,

Jugé :—1o. Que le gérant d'une banque ne peut légalement prêter les fonds de la banque à une com-

as a stockholder, he is largely interested; that the bank is not called upon to look to such company, or any individual stockholder, for the money so advanced; and that the bank manager so acting is bound to refund the money to the bank, with interest from the date of service of process, unless there has been acquiescence on the part of the bank in the conduct of the manager.

20. That a bank manager advancing the bank funds to a company in which he holds a small amount of stock, is not liable to the bank for the money so lent, if all the circumstances shew that his interest was so small that it may reasonably be presumed that his intent was solely to promote the interests of the bank.

30. That a bank manager cannot, without being guilty of a grave dereliction of duty, become associated with a customer of the bank in an enterprise to be carried on with the aid of the bank capital entrusted to his own care; and that the defendant, in the present case, in advancing the funds of the bank towards carrying on an enterprise in which he was himself interested, violated the well established rule of law:—"No one having duties of a fiduciary character to discharge, shall be allowed to enter into engagements in which he has or can have a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect."

40. That the liability of the defendant to make good the amount so improperly advanced to his associate had been extinguished by payment to the bank.

pagnie dans laquelle il a un intérêt majeur comme actionnaire; que la banque n'est pas appelée à s'adresser à telle compagnie, ou à aucun de ses actionnaires, pour les argents ainsi avancés; et que le gérant de la banque, agissant ainsi, est tenu de refondre les deniers à la banque, avec intérêt du jour de la sommation judiciaire, à moins qu'il n'y ait eu acquiescement de la part de la banque quant aux actes du gérant.

20. Que le gérant d'une banque avançant les fonds de telle banque à une compagnie, dans laquelle il n'a qu'un petit nombre d'actions, n'est pas responsable à la banque pour les argents ainsi prêtés, si dans les circonstances il appert que son intérêt était si minime que l'on pouvait raisonnablement présumer que son intention était seulement de promouvoir les intérêts de la banque.

30. Que le gérant d'une banque ne saurait, sans se rendre coupable d'un grave abandon de ses devoirs, s'associer avec des pratiques de la banque, dans une entreprise qui devait être conduite à l'aide des fonds de la banque confiés à ses soins; et que le défendeur, dans l'espèce, en faisant avance des fonds de la banque pour mettre à exécution une entreprise dans laquelle il était lui-même intéressé, violait la règle de droit bien établie: "Il ne sera permis à aucune personne ayant des devoirs d'un caractère fiduciaire à remplir, d'entrer dans des engagements dans lesquels il a un intérêt personnel opposé, ou qui pourrait être opposé aux intérêts de ceux qu'il est tenu de protéger."

40. Que la responsabilité du défendeur, pour le montant ainsi mal-à-propos avancé à son associé, avait été éteinte par paiement à la banque.

The Bank of Upper Canada and Bradshaw.

3

BANK OFFICE HOURS.—*Vide* PROMISSORY NOTE.

BIENS.—*Vide* DISCUSSION DE BIENS.

BILL OF COSTS.—*Vide APPEAR.*BILLET EN BREVET.—*Vide PROMISSORY NOTE, PRESENTATION.*BUILDINGS.—*Vide ACCEPTANCE OF WORKS.*CARTERS.—*Vide TRANSPORT DE MARCHANDISES.*

CAUTION.—RIGHTS OF A.

Held:—1o. That the joint surety takes advantages as well as the *caution simple* of the article 2037 of the Code Napoleon, which is taken from the old french law. It not being lawful for the creditor by his act, to permit the hypothec, to which the surety has a right to be subrogated, to diminish or to become extinct.

2o. That the act of the creditor is as well in *omittendo*, as in *committendo*.

Béliveau vs. Morelle.

Jugé:—1o. Que la caution solidaire profite, comme la caution simple, de l'article 2037 du Code Napoléon, qui n'est qu'une reproduction de l'ancien droit. Le créancier ne devant pas, par son fait, laisser diminuer ou éteindre les sûretés et hypothèques auxquelles la caution a droit d'être subrogée.

2o. Que le fait du créancier est aussi bien in *omittendo*, comme in *committendo*.

460

CAUTION.—RIGHTS.—*Vide PROMISSORY NOTE.*

CAPIAS AD RESPONDENDUM.—AMOUNT FOR.

Held:—1o. That a creditor for a sum of money under ten pounds, cannot, for the purpose of arresting his debtor, add to the amount of his claim an amount assigned to him, and thereupon issue a *capias ad respondendum*, without a previous notification to the debtor of such assignment, inasmuch as notification of the assignment is necessary to vest the debt in the assignee.

2o. That in an action for malicious arrest, the plaintiff must allege and establish in evidence, that he was arrested maliciously, and without reasonable or probable cause.

Laidlaw and Burns.

Jugé:—1o. Qu'un créancier pour une somme d'argent au-dessous de dix louis, ne peut, dans le but d'arrêter son débiteur, ajouter au montant de sa réclamation un montant à lui transporté, et sur ce émaner un *capias ad respondendum*, sans signification préalable au débiteur de tel transport, en autant que signification du transport est nécessaire avant que le cessionnaire devienne créancier du débiteur.

2o. Que dans une action pour faux emprisonnement, le demandeur est tenu d'alléguer et d'établir en preuve, qu'il a été malicieusement arrêté, sans raison ou cause probable.

319

CERTIORARI.—PRACTICE.

Held:—That a writ of *certiorari* must be addressed to the Judges and not to the prothonotary of the Court, and that a writ issued contrary to this rule will be quashed.

Grant and Lockhead.

Jugé:—Qu'un bref de *certiorari* doit être adressé aux Juges et non au protonotaire de la Cour, et qu'un bref émané contrairement à cette règle doit être rejeté.

309

CERTIORARI.—Vide PRACTICE.—MUNICIPALITY'S RIGHTS.**CERTIORARI.—PRACTICE.**

Held:—1o. That a writ of *certiorari* addressed to the Superintendent of Police, and which ought to have been addressed to the Judge of the Sessions of the Peace, according to the provisions of the 25 Vict., cap. 13, sect. 1, will be set aside.

2o. That another writ will not be awarded upon motion to that effect, to rectify the error in the address of the first writ.

Jugé:—1o. Qu'un bref de *certiorari* adressé au surintendant de police, lorsqu'il aurait dû l'être au Juge des sessions de la paix, suivant les dispositions de la 25 Vict., ch. 13, sect. 1, sera annulé.

2o. Qu'un nouveau bref ne sera pas accordé sur motion à cet effet pour rectifier l'erreur dans l'adresse du premier bref.

Piton et Lemoine.

316.

CHEMINS D'HIVER.

Held:—1o. That the corporation is obliged to keep up a road upon the ice bridge opposite to the city, and that the defendants are bound to keep up any other road opened by other people, if they permit or do not prevent it.

2o. That if the corporation tolerate another road but its own, the defendants are responsible for its being properly kept up, and of the negligence of their servants whose duty it is to keep such road in good order, in such way that it may be used without danger.

Jugé:—1o. Que la corporation est obligée d'entretenir un chemin sur le pont de glace vis-à-vis la ville, et que les défendeurs sont tenus à l'entretien de tout autre chemin pratiqué par d'autres, s'ils le permettent ou ne l'empêchent pas.

2o. Que si la corporation tolère un autre chemin que le sien, elle est responsable de son entretien, de la négligence de ses employés qui ont pour devoir de tenir ce chemin en bon ordre, de manière à ce qu'il soit praticable sans danger.

Sheppard vs. le Maire, les Conseillers et les Citoyens de Québec. 197

COMMON CARRIERS,—RIGHTS OF.—Vide TRANSPORT DE MARCHANDISES.**COMMUNICATION PUBLIQUE.—Vide MUNICIPALITY.****COMPENSATION.—DEBTS.**

Held:—That the amount of a debt already offered in compensation in a cause where such compensation has already been pleaded, cannot be so offered in another cause, even though the first cause be still pending before the Court.

Jugé:—Que le montant d'une créance une fois offerte en compensation dans une cause où telle compensation a été plaidée, ne peut pas l'être dans une autre cause, lors même que la première cause serait encore pendante devant la Cour.

Guy and Brown.

302

CO-PARTNERS, NOTES BY.—Vide PROMISSORY NOTES.**CONSTABLE, POWERS OF.—Vide NOTICE OF MOTION.****CONTEMPT.—Vide CONTRAINTES PAR CORPS.**

CONTESTATION, OF GARNISHEE'S DECLARATION.

Held:—That a plaintiff in his contestation of the declaration of a garnishee, cannot allege himself to be the proprietor of certain effects in the possession of the said garnishee, and conclude that the same be sold to satisfy the amount of a judgment against the defendant.

Jugé:—Qu'un demandeur ne peut dans sa contestation de la déclaration d'un tiers-saisi, alléguer à la fois qu'il est propriétaire de certains effets possédés par le tiers-saisi, et conclure à ce que ces mêmes effets soient vendus en satisfaction d'un jugement obtenu contre le défendeur.

Nordheimer, et al, vs. Roy et Hamelin.

298

CONTRAINTE PAR CORPS.

Held:—That the neglect or refusal on the part of a woman to comply with a judgment of the Court, which orders the making of an inventory, does not make her liable to a *contrainte par corps* for a contempt, and that the right of *contrainte par corps* does not exist against women guilty of such neglect or refusal.

Jugé:—Que la négligence ou le refus de la part d'une femme de se conformer à un jugement de la Cour, qui ordonne la confection d'un inventaire, ne la soumet pas à la contrainte par corps pour mépris de Cour, et que le droit de contrainte par corps n'existe pas contre la femme coupable de telle négligence ou de tel refus.

Larochelle et Mailloux, et ux.

407

CONTRAINTE PAR CORPS.—*Vide* APPEAL.

CONTRAINTE PAR CORPS.—EXECUTION DE JUGEMENT.

CONTRAT.—*Vide* AUTORISATION MARITALE.

Held:—1o. That it is not necessary that a judgment upon demand for a *contrainte par corps* for opposing the execution of a writ should recite *verbatim* the terms of the motion or rule.

Jugé:—1o. Qu'il n'est pas nécessaire qu'un jugement sur demande de contrainte par corps, pour rébellion à justice, reproduise *verbatim* les termes de la motion ou règle.

2o. That the return of the sheriff alone, is sufficient evidence to authorise the Court to adjudicate upon such demand, the defendant having failed to appear.

2o. Que le rapport du shérif seul, est une preuve suffisante pour autoriser le tribunal à prononcer sur telle demande, le défendeur n'ayant pas comparu.

3o. That upon such judgment, the imprisonment ought to take place in the district where the defendant resides.

3o. Que sur tel jugement l'incarcération devait avoir lieu dans le district où résidait le défendeur.

Crébas et Massue.

446

COSTS.—ON OPPOSITION.—PRACTICE.

Held:—That in the distribution arising from the sale of lands under execution, the assignee of a creditor, named in the registrar's certificate, is entitled to his costs of opposition, if the transfer has not been registered.

Jugé:—Que sur distribution des deniers provenant du décret d'immuebles, le cessionnaire d'un créancier porté au certificat des hypothèques, a droit à ses frais d'opposition, si son transport n'a pas été enregistré.

Lacoste vs. Jodoin et Quintal

393

COSTS.—PAYMENT OF.—ACQUITTANCEMENT.—*Vide* ATTORNEY AD LITEM.

COURS D'EAU.—*Vide* PROPRIETAIRES RIVERAINS.

CROWN LOTS.—PATENT FOR.

Held:—That crown lots remain crown property so long as no patent issues in respect of the same, and that *hypothèques* granted upon such lots by individuals in possession of, and who have improved the same, do not attach, and convey no rights to the mortgagees.

Jugé:—Que les lots de la couronne continuent d'être propriétés de la couronne tant qu'il n'émane pas de patentes pour tels lots, et que les hypothèques données sur telles propriétés par des individus qui en sont en possession, et qui les ont améliorées, ne sont pas valables et ne confèrent aucuns droits aux créanciers.

Pacaud and Pelletier.

305

CURATELLE—WHEN SET ASIDE.

Held:—That a *curatelle* will not be set aside at the instance of the brother-in-law of the interdicted party, who shews no interest in the matter, or that any fraud was practised at the time of the appointment of the curator.

Jugé:—Qu'une curatelle ne sera pas mise de côté à la demande d'un beau-frère de l'interdit, qui ne fait apparaître aucun intérêt dans l'affaire, ni qu'il y ait eu fraude pratiquée lors de la nomination du curateur.

Marois vs. Bilodeau.

169

CURATOR.—OBLIGATIONS.

In an action by a curator to the vacant estate of a testator, against the representatives of one of three joint executors for a specific amount of interest received by such executor:

Held:—In the Superior Court:—That when the testator by his will bequeathed to his brothers and sisters by name, the residue of his estate as universal residuary legatees, and the plea alleged accountability of the executors to such universal legatees, and not to the curator, and that the curator was irregularly named; the *onus* of proving that the universal legacy became *caduc* fell upon the plaintiff, and there being no such proof, the appointment of curator was a nullity.

In Appeal, without any expression of opinion on the point decided in the Court below, that the action was properly dismissed, on the

Dans une action par un curateur à la succession vacante d'un testateur, contre les représentants de l'un des trois exécuteurs conjoints pour le montant de certains intérêts reçus par tel exécuteur:

Jugé:—Dans la Cour Supérieure:—Que lorsque le testateur par son testament a légué à ses frères et sœurs nommément, le résidu de sa succession comme légataires universels résiduels, et le plaider alléguait comptabilité des exécuteurs à tels légataires universels, et non au curateur, et que le curateur avait été irrégulièrement nommé; que l'*onus probandi* que le legs universel était devenu *caduc* incombait au demandeur, et que n'y ayant aucune telle preuve, la nomination de curateur était nulle.

En Appel, sans exprimer aucune opinion quant à la question décidée en Cour inférieure, que l'action devait être renvoyée par la

ground that if the legal representatives of the testator had any claim, it must be urged against all three executors or their representatives for the gestion of the estate generally, and not for a specific sum of money.

raison que si les représentants légaux du testateur avaient aucune réclamation, icelle devait être exercée contre les trois exécuteurs ou leurs représentants en raison de leur administration de la succession généralement, et non pour un montant donné.

McPhee and Woodbridge.

157

DAMAGES.—*Vide* ABORDAGE.—GROSS NEGLIGENCE.—INJURES VERBALES.—MALICIOUS ARREST.—MARRIAGE.—RESPONSIBILITY.—ROADS.

DÉBOURSÉS.—*Vide* GARDIEN d'OFFICE.

DEBTS.—*Vide* COMPENSATION.

DECLARATION DE PATERNITÉ.—PRACTICE.

Held:—That a demand en déclaration de paternité may be made by the grand father, without any tutor to the child, the mother being a minor; and that the Court may upon such demand award *aliments*, as well for the past as for the future, and without the necessity of a new action for the future *aliments*.

Jugé:—Que la demande en déclaration de paternité peut être portée par l'ayeul, sans qu'il y ait tutelle à l'enfant, la mère étant mineure; et que la Cour peut sur telle demande accorder des aliments, tant pour le passé que pour l'avenir, et sans qu'il soit besoin de nouvelle action pour les aliments futurs.

Patoille et Desmarais.

189

DECRET.—EFFECT ON IMMOVABLES.

Held:—1o. That the décret of an immovable extinguishes all rights of property, except when the proprietor is in possession at the time of the décret of an immovable seized *super non domino*.

Jugé:—1o. Que le décret purge un immeuble de tous les droits de propriété, excepté dans le cas où le propriétaire est, lors du décret, en possession de l'immeuble saisi *super non domino*.

2o. That if at the period of the seizure of an immovable the proprietor is not in possession thereof, he must, for the preservation of his rights of property, oppose the sale by the usual means.

2o. Que si au moment de la saisie d'un immeuble le vrai propriétaire n'en est pas en possession, il doit pour conserver son droit de propriété, s'opposer à la vente par les moyens ordinaires.

Patton et Morin.

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DELIVERY AND FREIGHT.—*Vide* TRANSPORT DE MARCHANDISES.

DEPOSIT.—VENIRE FACIAS.—PRACTICE.

Held:—That the deposit required by the 65th rule of practice need only be made at the same time with the motion for a *venire facias*, and that this motion can only be made after definition of the facts to be submitted to the Jury.

Jugé:—Que le dépôt exigé par la 65e règle de pratique ne doit se faire que simultanément avec la motion pour *venire facias*, et que cette dernière motion ne se peut faire qu'après la définition des faits à être soumis au jury.

Glass vs. Denis, et al.

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DEPOSIT.—WHEN REQUIRED.—PRACTICE.

The plaintiff sued for damages, concluding that a sum of sixty pounds be paid him, and that the defendant be condemned to perform certain works to put an end to such damages for the future. The plaintiff's action having been dismissed he inscribed for review.

Held:—That, in a case of this description, a deposit of twenty dollars, in conformity with the statute, was sufficient, and that the action was not a real action.

Le demandeur poursuivait en dommages, concluant à ce qu'il lui fut payé une somme de soixante louis, et que la défenderesse fut contrainte à faire certains travaux pour empêcher tels dommages à l'avenir. Le demandeur ayant failliit se pourvut en révision.

Jugé:—Qu'en pareil cas, un dépôt de vingt piastres, au désir du statut, était suffisant, et qu'il n'y avait rien de réel dans l'action.

Dessaint dit Saint-Pierre vs. La Compagnie du Grand Tronc de chemin de fer du Canada.

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DESTINATION, IMMEUBLES PAR.—*Vide* IMMEUBLES.DETTES MOBILIERES.—*Vide* TESTAMENTARY EXECUTOR.

DIMES.

Held:—That where the defendant in an action for tithes pleaded that he was not a member of the roman catholic Church, but was a protestant and had given the curé, plaintiff in the cause, due notice thereof, such notice cannot be proved by parol evidence.

Jugé:—Que lorsque le défendeur dans une action pour *dîmes* a plaidé qu'il n'appartenait pas à l'église catholique romaine, mais qu'il était protestant, et avait donné avis de ce fait au curé, le demandeur dans la cause, tel avis ne pourra être prouvé par témoignage verbal.

Proulx vs. Dupuis.

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DISCUSSION DE BIENS.

Held:—That, in the case submitted, upon a deed in the nature of a *transaction*, by reason of an hypothecary claim after discussion, there must be discussion of all the estate, moveable and immoveable of such debtor, before recourse can be had against the *tiers-détenteurs*.

Jugé:—Que, dans l'espèce, sur un acte de la nature d'une transaction, à raison d'un recours hypothécaire après discussion du débiteur, il faut discussion de tous les biens meubles et immeubles de ce débiteur, avant de pouvoir exercer recours contre les tiers-détenteurs.

DeBeaujeu et Deschamps.

454

DISSENTIENTS.—*Vide* SCHOOL MUNICIPALITY.DISTRIBUTION DE DENIERS.—*Vide* COSTS, ON OPPOSITION.DONATION.—*Vide* AUTORIZATION MARITALE POUR CONTRAT.ECHEANCE.—*Vide* PROMISSORY NOTE, DATE OF.

EMPIETEMENT.—CHEMIN PUBLIC.

Held:—That in an action for encroachment on a public road, the defendant can set up by way of defence that the encroachment was made by third parties.

Jugé:—Que dans une action pour empiètement sur un chemin public, le défendeur peut opposer pour défense que l'empiètement est commis par des tierces personnes.

La Corporation de Saint-Jean-Baptiste vs. Lachance.

315

ENQUETE.—INSCRIPTION FOR

Held:—1o. That a party has no right to inscribe for *enquête* and merits for a day certain, even upon giving notice to the adverse party, unless it be by consent.

2o. That, failing such consent, the case will be fixed by the Court.

Jugé:—1o. Qu'une partie n'a pas le droit d'inscrire pour audition à l'enquête et mérite pour un jour fixe, même en donnant avis à la partie opposée, à moins que ce ne soit de consentement.

2o. Qu'à défaut de tel consentement, la cause sera fixée par la cour.

Lemieux vs. Brochu.

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ENQUETE PAR ECRIT.—*Vide* HYPOTHECARY ACTION.ENREGISTREMENT DE VOTES.—*Vide* QUO WARRANTO.ETAT CIVIL.—*Vide* RECTIFICATION DE REGISTRES.

EVIDENCE.—HUSBAND AND WIFE.

Held:—That a wife cannot be examined on *faits et articles*, or as witness against her husband, unless she is a party to the cause and her rights are concerned, but not otherwise.

Jugé:—Qu'une femme ne peut être interrogée sur faits et articles, ou examinée comme témoin contre son mari, à moins qu'elle ne soit partie à la cause et que ses droits y soient en question, mais pas autrement.

Lefort vs. Marie dit Ste.-Marie.

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EXCEPTION A LA FORME.—PRACTICE.

Held, in the Superior Court:—That an exception *à la forme* on the ground of the nullity of the affidavit of service of the writ and declaration on the defendant, described in the writ as "of Toronto, in the Home district of Canada West," will be maintained, and the action dismissed, the affidavit stating the service to have been made on the defendant by delivering copies of the said writ and declaration to the wife of the defendant, "of the Township of York, in the county of York, at his place of residence in the said Township of York."

In appeal:—Judgment maintained on the ground that the service as made was contrary to the provisions of the Cons. Stat. of L. C., chap. 83, sec. 93.

Jugé, dans la Cour Supérieure:—Qu'une exception à la forme fondée sur la nullité de l'affidavit de la signification du writ et de la déclaration sur le défendeur, désignée au dit writ comme étant "de Toronto, dans le Home district du Canada Ouest," sera maintenue et l'action renvoyée, l'affidavit énonçant que la signification avait été faite sur le défendeur en délivrant copie des dits writ et déclaration à la femme du défendeur, "dans le Township de York, dans le comté de York, à son lieu de résidence dans le dit Township de York."

En Appel:—Jugement confirmé par la raison que la signification telle que faite était contraire aux dispositions du Stat. Ref du B. C., chap. 83, sec. 93.

The Montreal Assurance Co., and McPherson.

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EXCEPTION A LA FORME.—*Vide* PLEADINGS.—SEPARATION DE BIENS.

EXECUTION OF JUDGMENT.

Held:—That a judgment creditor may simultaneously exercise every mode of seizure and of execution which the law permits, to enforce payment of what is due him.

Jugé:—Qu'un créancier par jugement a droit d'exercer simultanément tous les modes de saisie et d'exécution que la loi accorde, pour contraindre le paiement de ce qui lui est dû.

Lalonde vs. Lalonde and Lalonde.

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EXECUTION OF JUDGMENT.—*Vide* CONTRAINTE PAR CORPS.

FACTUM, FILING OF.—PRACTICE.

Held:—That an attorney, representing no party in a cause, at the time of filing a factum signed by him, may nevertheless file such factum.

Juge:—Qu'un procureur, ne représentant aucune partie dans la cause, à l'époque de la production d'un factum signé par lui, peut néanmoins produire tel factum.

Bell and Stephens.

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FACTUM EN REVISION.—*Vide* INSCRIPTION.

FEEES.—*Vide* APPEAL.—BILL OF COSTS.—GARDIEN D'OFFICE.

FELONY.—*Vide* NEW TRIAL.

FLOWING WATERS.—*Vide* PROPRIETAIRES RIVERAINS.

FORMA PAUPERIS.—PRIVILEGE OF

Held:—That the privilege of proceeding in *forma pauperis* cannot be granted in the Court of Appeals.

Jugé:—Que la faculté de plaider in *forma pauperis* ne peut être accordée en Cour d'Appel.

Legault et Legault.

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FRAUDE.—*Vide* ACCEPTANCE OF WORKS.

GARANTIE DE TROUBLE.

To an action brought to enforce a sale by an auctioneer of certain real estate according to a memorandum of purchase signed by the defendant, and praying that defendant be condemned to take a title and to pay the instalment to become due at the passing of the deed, and to create a mortgage and insure the property as security for the balance of the *prix de vente*, within a time to be fixed by the Court, and in default thereof, that the judgment should avail as a title under the condition or memorandum; the defendant pleaded that he had just cause to fear being troubled by a

Dans une action portée pour contraindre l'exécution d'une vente par un encanteur de certain immeuble suivant promesse d'acquisition signée par le défendeur, et concluant à ce que le défendeur prit titre et fut condamné à payer le versement qui devait échouer lors de la passation de l'acte, et de donner une hypothèque et d'assurer la propriété pour le montant de la balance du prix de vente, dans un délai à être fixé par la Cour, à défaut de quoi le jugement vaudrait titre aux conditions énoncées en la promesse; le défendeur plaida qu'il avait juste droit de craindre un

substitution created by the will of the plaintiffs' father, in favor of the children of the plaintiffs, and that the sheriff's title invoked by the plaintiffs, and obtained on a *délaissement*, made by them in a cause brought by their mother, widow of the testator, was not valid, but was obtained by concert to get rid of the substitution.

Held:—1o. That the defendant had just cause to fear that he would be troubled by reason of the matters set up in the plea.

2o. That inasmuch as the plaintiffs demanded an immediate condemnation for the instalment payable at the passing of the deed, and had not offered security, nor the defendant demanded such security, the Court had no power to order it to be given.

3o. That, therefore, and inasmuch as the defendant was not liable to be condemned to pay, without security, the action must be dismissed with costs.

McIntosh, et al. vs. Bell.

GARDIEN D'OFFICE.—ACTION.

Held:—That a *gardien d'office* has no action for his allowance and disbursements against the *saisi*, there being no contract express or implied between them.

Dansereau vs. Girard.

GARNISHEE'S DECLARATION.—*Vide* CONTESTATION.

CROSS NEGLIGENCE.

Held:—1o. That a party suing in damages resulting from imputed culpable fault or negligence on the part of the defendant, must himself be without any misconduct or fault and have used ordinary care; and that where an injury has resulted from the negligence of both parties, more especially if without any wanton or intentional wrong on the part of either, an action will not lie.

2o. That to sustain an action in

trouble en raison d'une substitution créée par le testament du père des demandeurs, en faveur des enfants des demandeurs, et que le titre du shérif invoqué par les demandeurs, et obtenu sur *délaissement*, fait par eux dans une action portée par leur mère, veuve du testateur, n'était pas valable, en raison de ce qu'il avait été obtenu dans le but de se débarrasser de la substitution.

Jugé:—1o. Que le défendeur avait juste cause de craindre un trouble en raison des matières alléguées dans le plaidoyer.

2o. Qu'en autant que les demandeurs concluaient à une condamnation immédiate pour le versement payable lors de l'exécution de l'acte, et n'avaient offert aucune garantie, ni le défendeur demandé telle garantie, la Cour ne pouvait ordonner qu'icelle fut fournie.

3o. Que, par conséquent, et en autant que le défendeur ne pouvait être condamné à payer sans garantie, l'action devait être renvoyée avec dépens.

Jugé:—Qu'un *gardien d'office* n'a pas d'action pour son salaire et ses déboursés contre le *saisi*, en autant qu'il n'y a pas entre eux contrat exprès ou convention tacite.

Jugé:—1o. Qu'il faut que celui qui réclame des dommages causés par la faute grossière ou par la négligence du défendeur, soit lui-même à l'abri d'une imputation de négligence ou manque de soin ordinaire; et que dans le cas où le tort serait le résultat d'une faute commune, et plus particulièrement dans l'absence d'aucune voie de fait ou tort prémédité, il n'y a pas d'action.

2o. Que pour maintenir une ac-

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damages resulting from negligence on the part of the defendant, the burden of proof to shew such wilful negligence, or otherwise, by the defendant, is on the plaintiff, who is further bound to shew ordinary care by himself, or, that if he himself did not exercise ordinary care, this did not contribute to the alleged injury.

3o. That there must be affirmative proof of due care at the time of the accident.

4o. That when damage is done by a party, in the exercise of his lawful rights, the plaintiff must prove that the loss occurred without his fault, and by the neglect of the defendant.

5o. That though the defendant is guilty of gross negligence, causing damage to the plaintiff, yet where the plaintiff was guilty of want of ordinary care, contributing essentially to the injury, he cannot recover.

Moffette vs. The Grand Trunk Railway Company of Canada. 231

HUSBAND AND WIFE.—*Vide* APPEAL, INTERLOCUTORY JUDGMENT.—EVIDENCE.

HYPOTHECARY ACTION.—NATURE OF

Held:—That the hypothecary action is of its nature a real action, and therefore appealable, and that parties thereto have a right to have the *enquête* reduced to writing.

Dupont, et al. et Grange.

tion en dommages causés par la négligence du défendeur, l'onus probandi quant à telle négligence incombe sur le demandeur, qui, en outre, sera tenu de prouver qu'il n'y a pas eu manque de soin de sa part, ou, s'il y a eu négligence de sa part, que telle négligence n'a nullement contribué au tort dont on se plaint.

3o. Qu'il faut produire preuve affirmative de précautions suffisantes à l'époque de l'accident.

4o. Que quand le dommage est causé par une personne dans l'exercice de ses droits légaux, il faut que le demandeur établisse qu'il n'y a pas eu faute de sa part, et qu'il y a eu négligence de la part du défendeur.

5o. Que dans le cas où le défendeur est coupable de négligence grossière causant le dommage, si le demandeur a montré un manque de soins ordinaires et a ainsi essentiellement contribué au tort, il n'a pas droit d'action.

Jugé:—Que l'action hypothécaire est de sa nature une action réelle, conséquemment sujette à appel, et que les parties ont droit de faire rédiger l'enquête par écrit.

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HYPOTHÈQUE.

Held:—1o. That under the provisions of the 9th Vic., cap. 62, sec. 18, Her Majesty has a mortgage upon the immovables of the surety of a borrower of moneys upon the fund reserved for a loan to the sufferers by the fires of 1845, and that it is not necessary that such mortgage should be registered.

2o. That such mortgage although not registered takes priority of all those registered subsequently to the date of such loan.

Venner et le Solliciteur Général, pro Regina.

Jugé:—1o. Que d'après les dispositions de la 9e Vic., cap. 62, sec. 18, la Reine a une hypothèque sur les biens de la caution d'un emprunteur de sommes sur le fonds réservé pour prêt aux incendies de 1845, et qu'il n'était pas nécessaire que cette hypothèque eut été enregistrée.

2o. Que cette hypothèque quoique non enregistrée prime toutes celles enregistrées subseqüemment à la date de tel prêt.

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HYPOTHEQUE.—Vide CROWN LOTS.**IMMEUBLES, PAR DESTINATION.**

Held:—That the locomotives upon a railroad are immovable *par destination*, and cannot be seized and sold apart from the road.

Jugé:—Que les locomotives d'un chemin de fer sont immeubles *par destination*, et ne peuvent être saisies et vendues séparément du chemin.

La Compagnie du Grand Tronc de Chemin de Fer du Canada et The Eastern Township's Bank.

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ICE BRIDGE.—Vide CHEMIN D'HIVER.**INCORPORATED BANK.—Vide JURISDICTION.****INDORSEMENT.—Vide PROMISSORY NOTE.****INJUNCTION.—Vide TRANSPORT DE MARCHANDISES.****INJURES VERBALES.—PRACTICE.**

Held, in the Superior Court:—In an action in damages for injury to the feelings and character of the plaintiff by words addressed to him, in the street, by the defendant, alleged in the declaration to be as follows: "Rolland, arrête donc? Quand me payes-tu? Paye donc tes dettes avant de faire le monsieur, gredin que tu es," the proof being that the words used by the defendant, speaking to the plaintiff, were, "paye tes dettes, paye tes dettes," that the action was not sustained by proof, and was of too trivial a nature to warrant a judgment in damages.

In appeal:—1o. That the essential allegations of the declaration were proved.

2o. That the expressions must have wounded the sensibility of the plaintiff, and therefore, gave him a right of action.

3o. That a receipt signed by the parties for notes received as collateral security for the plaintiff's debt, and dated five months before the injury complained of, and produced by the defendant at *enquête*, as well as a receipt to the defendant, in full, given subsequently to the action, should have been rejected from the record.

Jugé, dans la Cour Supérieure:— Dans une action en dommages pour injure aux sentiments et au caractère du demandeur, par paroles à lui adressées, dans la rue, par le défendeur, alléguées dans la déclaration être comme suit: "Rolland, arrête donc? Quand me payes-tu? Paye donc tes dettes avant de faire le monsieur, gredin que tu es," la preuve étant que les mots dont s'était servi le défendeur, étaient, "paye tes dettes, paye tes dettes," que l'action n'était pas soutenue par la preuve, et était trop triviale pour soutenir un jugement en dommages.

En appel:—1o. Que les allégations essentielles de la déclaration étaient prouvées.

2o. Que les expressions devaient avoir blessé les sentiments du demandeur, et partant, lui donnaient droit d'action.

3o. Qu'un reçu signé par les parties pour billets reçus comme cautionnement collatéral pour la dette du demandeur, et daté cinq mois avant l'injure en question, et produit par le défendeur à l'enquête, aussi bien qu'un reçu en plein au défendeur, donné subseqüemment à l'action, eussent dû être rejetés du record.

Lenoir dit Rolland and Jodoin.

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INSCRIPTION A L'ENQUETE.—*Vide Enquete.*

INSCRIPTION EN REVISION.—PRACTICE.

Held:—That where a party inscribes a cause for review and fails to file the factum or statement in review, as required by the rules of practice, and to shew cause why the inscription should not be set aside, such inscription will be discharged and the case remitted to the Court below.

Ellis vs. Gould.

Jugé:—Que dans le cas où une partie inscrit pour révision et fait défaut de produire son factum en révision, suivant l'exigence des règles de pratique, et de montrer cause pourquoi l'inscription ne serait pas mise de côté, telle inscription sera rayée et la cause renvoyée au tribunal de première instance.

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INSCRIPTION FOR REVIEW.—*Vide APPEAL, INTERLOCUTORY JUDGMENT IN REVIEW.*INSOLVENCY.—*Vide PROMISSORY NOTE, RIGHT OF A CAUTION.*

INSOLVENT ACT.

Two creditors, whose claims together amounted to \$500, made a demand against their debtor for an assignment of his estate and effects under the Insolvent Act of 1864, sec. 3, sub-sec. 2, and it appeared in evidence, on the debtor's petition to stay proceedings, that one of the creditors had made the demand solely in order to obtain payment of the amount due him.

Held:—That the demand was "made without reasonable grounds, and merely as a mean of enforcing payment," and was therefore contrary to the insolvent act, sec. 3, sub-sec. 3, and therefore that the conclusions of the petition to stay proceedings must be awarded.

Lacombe, et al. and Lanctot.

Deux créanciers, dont les créances s'élevaient en tout à plus de \$500, firent une demande contre leur débiteur pour une cession de ses biens et effets en vertu de l'Acte de faillite de 1864, sec. 3, sous-sec. 2, et il apparut par la preuve sur requête du débiteur pour suspendre les procédures, que l'un des créanciers n'avait fait cette demande que dans le but d'obtenir paiement du montant qui lui était dû.

Jugé:—Que la demande avait été faite "sans motifs raisonnables, seulement comme moyen de le forcer à payer," et était par conséquent contraire au dit acte de faillite, sec. 3, sous-sec. 3, et par tant que les conclusions de la dite requête pour suspendre les procédures devaient être accordées.

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INTERDIT.—*Vide CURATELLE.*INTERLOCUTORY JUDGMENT.—*Vide APPEAL.*

INTERPRETATION D'ACTE.

Held. in the Superior Court:—That the deed produced in the cause was not to be considered a deed conveying the property of the immovables therein described, and that, consequently, the opposition must be maintained.

Jugé, en Cour Supérieure:—Que l'acte produit dans la cause ne devait pas être considéré comme un acte translatif des propriétés immobilières y désignées, et que, par conséquent, l'opposition devait être maintenue.

In review:—That the deed explained by the circumstances under which it had been made, as well as by the possession it gave to the parties, must be considered as conveying a right of property, and the opposition dismissed.

Badeau vs. Guay et Badeau.

En révision:—Que l'acte étant expliqué par les circonstances sous lesquelles il avait été fait, ainsi que par la jouissance qu'il accordait aux parties, on devait le considérer comme translatif de propriété, et renvoyer l'opposition.

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INVENTAIRE, REFUS DE FAIRE.—*Vide* CONTRAINTÉ PAR CORPS.

JUGE DES SESSIONS DE LA PAIX.—*Vide* PRACTICE, MUNICIPALITY'S RIGHTS.

JUGES DE PAIX.—*Vide* MALICIOUS ARREST.—NOTICE OF MOTION.

JUDGMENT CREDITOR.—*Vide* EXECUTION OF JUDGMENT.

JURIDICTION.—SUPERIOR COURT.

Held:—1o. That the Superior Court, or a Judge of such Court in vacation, has jurisdiction, in virtue of the Con. Stat. for L. C., cap. 88, to inquire, upon petition, *requête libellée*, presented for that purpose, of the validity of the election of a bank director; inasmuch as an incorporated bank must be considered as a public corporation.

2o. That a writ in the nature of a *quo warranto*, issuing in virtue of the provisions of the said Con. Stat. for L. C., cap. 88, must be addressed to a bailiff of the Superior Court, to be by him served and returned, and not addressed to the defendant in the cause.

3o. That, in the case submitted, the affidavits produced in support of the declaration, or *requête libellée*, of the plaintiff, were sufficient.

Henry vs. Simard.

Jugé:—1o. Que la Cour Supérieure, ou un Juge de telle Cour en vacance, a juridiction, en vertu du Stat. Ref. du B. C., chap. 88, de s'enquérir, sur requête libellée présentée à cet effet, de la validité de l'élection d'un directeur d'une banque; en autant qu'une banque incorporée doit être considérée comme corporation publique.

2o. Que le bref de *quo warranto*, émanant en vertu des dispositions du dit Stat. Ref. du B. C., chap. 88, doit être adressé à un huissier de la Cour Supérieure, pour être par lui signifié et rapporté, et non adressé au défendeur dans la cause.

3o. Que, dans l'espèce, les affidavits produits au soutien de la déclaration, ou requête libellée, du demandeur, étaient suffisants.

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JURIDICTION.—*Vide* PRACTICE, MUNICIPALITY'S RIGHTS.

JURY TRIAL.—*Vide* TRIAL BY JURY.

LEGACY.—*Vide* CURATOR.—MATRIMONIAL RIGHTS.

LOCOMOTIVES.—*Vide* IMMEUBLE PAR DESTINATION.

MALICIOUS ARREST.—LIABILITY.

In an action for malicious arrest and imprisonment brought against two magistrates, and also against the complainant, and the bailiff who conveyed the plaintiff to jail.

Held, in the Superior Court, Montreal:—That the complainant

Dans une action pour arrestation et emprisonnement malicieux contre deux juges de paix, et aussi contre le plaignant, et l'huissier qui avait conduit le demandeur en prison.

Jugé, dans la Cour Supérieure, Montréal:—Que le plaignant avait

had acted with malice, and that the magistrates had lent themselves to his views and had issued an illegal warrant.

In appeal:—10. That the complainant had good ground for making his affidavit before the magistrates, but had not participated in any of the subsequent proceedings; that the bailiff had in good faith executed the magistrates warrant, and that as against the complainant and bailiff, the action must be dismissed.

20. That the magistrates had issued an illegal warrant and were liable to the plaintiff in damages, but that the sum awarded by the Court below was, under all the circumstances, excessive.

agit malicieusement, et que les juges de paix s'étaient prêtés à ses vues, et avaient émané un warrant illégal.

En appel:—10. Que le plaignant avait de bonnes raisons pour faire son affidavit devant les juges de paix, mais n'avait nullement participé dans les procédures subséquentes; que l'huissier avait agi de bonne foi en exécutant le warrant des juges de paix, et que quant au plaignant et à l'huissier, l'action devait être renvoyée.

20. Que les juges de paix avaient émané un warrant illégal et étaient passibles de dommages envers le demandeur, mais que la somme accordée par la Cour inférieure était, sous toutes les circonstances, excessive.

Bissonnette, et al, and Bornais.

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MALICIOUS ARREST.—*Vide CAPIAS AD RESPONDENDUM.*

MANDAT.—**POUVOIRS QU'IL CONFÈRE.**

The respondent sold to the appellant a quantity of futtocks of certain sizes, set forth in written contracts signed by them respectively. It was covenanted that the appellant should send a man to work for the respondent, and superintend the getting out of the futtocks, the appellant agreeing to receive everything marked off for her by the man she would select for that purpose. The respondent tendered to the appellant a quantity of futtocks which were, although marked off, under size and of an inferior quality, which she refused to accept:

Held:—That the *mandat* of the man so selected by the appellant only extended to judge of the quality of the futtocks got out by the respondent; that he had nothing to do with their size, which was fixed by the contract, and that he had no power or authority to bind the appellant by marking off futtocks that were not of the sizes and quality stipulated.

L'intimé vendit, et l'appellant acheta, une quantité de courbes, *futtocks*, de certaines dimensions, établies par contrats sous seing privé. Il fut convenu que l'appellante enverrait un homme travailler pour l'intimé, et pour surveiller la confection des courbes, l'appellante s'obligeant de recevoir tout ce que l'homme choisi par elle pour cet objet marquerait comme recevable. L'intimé offrit à l'appellante une quantité de courbes qui étaient, quoique marquées, au dessous des dimensions voulues et de qualité inférieure, lesquelles elle refusa d'accepter:

Jugé:—Que le mandat de l'individu choisi par l'appellante ne s'étendait qu'à juger de la qualité des courbes fournies par l'intimé; qu'il n'avait rien à faire avec leurs dimensions, qui étaient établies par le contrat, et qu'il ne pouvait lier l'appellante en marquant des courbes qui n'étaient pas des dimensions voulues et de la qualité stipulée.

Vanfelson and Mann

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MARRIAGE.—DEFENSE DE CELEBRATION.

Held:—10. That a protestant minister is liable in damages for celebrating the marriage of a minor, daughter of the plaintiff, without the plaintiff's knowledge and consent; and this notwithstanding he acted by virtue of the marriage license usually issued in such cases.

20. That, under the circumstances of the case, such damages will be restricted to one hundred dollars and costs of the lowest class of actions in the Superior Court.

Mignault vs. Bonar.

Jugé:—10. Qu'un ministre protestant est responsable en dommages pour la célébration du mariage de la fille mineure du demandeur, hors la connaissance de ce dernier et sans son consentement; et ce nonobstant qu'il fût muni de la licence ordinaire en pareil cas.

20. Que, dans les circonstances de la cause, les dommages seront restreints à la somme de cent piastres et les frais de la dernière classe d'action de la Cour Supérieure.

195

MATRIMONIAL RIGHTS.—Vide APPEAL, INTERLOCUTORY JUDGMENT.

MUNICIPAL ACT, EFFECT OF.—Vide APPEAL.—EMPIETEMENT.

MUNICIPALITY, LIABILITY OF.—Vide PROCES-VERBAL.—ROADS.

MUNICIPALITY, OBLIGATIONS.

Held:—That municipalities have no right to impose upon the Grand Trunk Railway Company of Canada, the obligation of performing works in relation to public roads, independently of those required for its railway.

La Corporation de la paroisse de Saint-Liboire, et la Compagnie du Grand Tronc de Chemin de Fer du Canada.

Jugé:—Que les municipalités ne peuvent imposer à la Compagnie du Grand Tronc de Chemin de Fer du Canada, l'obligation de faire des travaux de communication publique, indépendants de ceux qui sont requis pour la voie ferrée.

196

NEIGHBOURS.—Vide PROPRIETAIRES RIVERAINS.

NEW TRIAL, FOR FELONY.

Held:—That in a case of felony no new trial can legally be had.

Jugé:—Que dans le cas de félonie un nouveau procès ne peut être accordé.

The Atty.-Gen. pro Regina vs. D'Aoust.

485

NOTICE OF MOTION.—SUFFICIENCY.—PRACTICE.

A notice of action to a person acting as a constable, under the 14 and 15 Vic., cap. 54. (Con. Stat. L.C., cap. 101) stated the cause of action to the effect following: "For that you, on the 20th day of December, 1864, unlawfully did apprehend and seize A. B., and unlawfully did keep him a prisoner for a long space of time, to wit: for the space of four days, and other wrongs to the said A. B., then did, &c."

Un avis de motion à une personne agissant comme constable, sous l'acte de la 14 et 15 Vict., chap. 54, (Stat. Ref., B.-C., chap. 101) énonçait la cause d'action comme suit: "Parce que, le 20e jour de décembre 1864, vous avez illégalement pris et détenu A. B., et l'avez illégalement retenu prisonnier pour un long espace de temps savoir: pour l'espace de quatre jours, et autres torts envers le dit A. B., avez commis, etc."

Held:—After a verdict in favor of the plaintiff, upon points reserved at the trial:—10. That an omission to state in the notice the place where the injury complained of was sustained, was fatal to the plaintiff's right to recover: Judgment for the defendant, as in the case of a non-suit, given.

20. That the plaintiff, in his proof, must be limited to the day and the occasion stated in his notice and declaration, when the defendant had been sworn in as a constable; and that he, the plaintiff, could not extend such proof to the acts of the defendant of the previous day, when the plaintiff was arrested by him, acting as a private individual, so as to obtain damages as arising from them.

Jugé:—Après verdict en faveur du demandeur, sur questions réservées au procès:—10. Que l'omission d'énoncer dans l'avis la place où l'injure dont on se plaignait avait été commise, était fatal aux droits de recouvrement du demandeur: Jugement pour le défendeur, comme dans le cas d'un non-suit, rendu.

20. Que le demandeur, devait être restreint, dans sa preuve, au jour et à l'occasion énoncés dans sa notice et dans sa déclaration, quand le défendeur avait été assermenté comme constable; et que lui, le demandeur, ne pouvait faire porter cette preuve sur les actes du défendeur de la journée d'avant, quand le demandeur avait été arrêté par lui, agissant en sa qualité privée, de manière à obtenir des dommages résultant d'iceux.

Bettersworth vs. Hough.

419

NOTICE OF COMPLAINT.—*Vide* TRINITY HOUSE.

NOVATION.—*Vide* PROMISSORY NOTE.

NULLITÉ D'ADJUDICATION, PAR SHERIF.

Held:—That a person openly and peaceably in possession of a lot of land, seized and sold by the sheriff for a debt due by his *auteur*, can bring a direct action against the plaintiff who became the *adjudicataire*, and against the defendant and sheriff, to be declared the proprietor, and have the adjudication set aside as null and void as having been made *super non domino*, and this without filing any opposition, or taking any other proceedings in the cause wherein the adjudication was made.

Jugé:—Qu'une personne publiquement et paisiblement en possession d'un lot de terre, saisi et vendu par le shérif pour une dette due par son auteur, peut porter une action directement contre le demandeur qui est devenu l'adjudicataire, et contre le défendeur et le shérif, pour être déclaré propriétaire, et faire mettre l'adjudication de côté comme nulle et non avenue comme ayant été faite *super non domino*, et ce sans la production d'aucune opposition, ou sans avoir adopté aucune autre procédure dans la cause où l'adjudication avait été faite.

Tessier vs. Bienjonetti, et al.

159

ONUS PROBANDI.—*Vide* CURATOR.—GROSS NEGLIGENCE.—TRANSPORT DE MARCHANDISES.—WILL, VALIDITY OF.

PAROL EVIDENCE.—*Vide* ACTES DE COMMERCE.—DIMES.

PATENT, FOR LOTS.—*Vide* CROWN LOTS.

PETITION.—*Vide* REPRISE D'INSTANCE.

PHOTOGRAPHY.—*Vide* ACTE DE COMMERCE.

PLEADINGS.—SEPARATION DE BIENS.

Held:—That the absence of allegation, in an action by a woman *séparée de biens contractuellement* from her husband, of the deed establishing such separation, must be pleaded by an exception to the form, and not by a *défense au fonds en droit*.

Jugé:—Que le défant d'allégation, dans une demande par une femme séparée de biens contractuellement de son mari, du titre établissant cette séparation, doit être invoqué par exception à la forme, et non par défense au fonds en droit.

Walker, et vir, et la Corporation de la ville de Sorel.

264

PLEADINGS.—Vide PROMISSORY NOTE.—RECTIFICATION DE REGISTRE.

PRACTICE.—ARTICULATION OF FACTS.

Held:—That in the case of a defendant sued upon a foreign judgment, the Court will grant a motion that the plaintiff produce the note, or bill of particulars, upon which the said judgment was based.

Jugé:—Que dans le cas d'un défendeur poursuivi sur un jugement rendu à l'étranger, la Cour accordera une motion que le demandeur produise le billet, ou compte de particularités, sur lequel le dit jugement a été rendu.

Hopock, et al, vs. Demers.

397

ASSIGNMENT.

Held:—That an action *en séparation de biens* may be brought out of the district where the parties have their domicile, if the service be a personal service upon the defendant, within the district where the suit is brought.

Jugé:—Qu'une action *en séparation de biens* peut être portée hors du district où les conjoints sont domiciliés, pourvu que l'assignation soit donnée personnellement au défendeur, dans le district où l'action est ainsi portée.

Harnois et Xavier dit St. Jean.

255

MOTION TO AMEND.

Held:—That where a defendant moved before *enquête* to amend his plea on payment of costs, on affidavit to the effect that from absence from the country, and from sickness, he had been unable to give proper instructions to his attorneys, and afterwards made a similar motion at the hearing on the merits, both of which motions were rejected, the Court of Review will reverse the final judgment rendered and allow the defendant to plead *de novo*, on payment of all costs, considering that sufficient cause had been shewn to authorize the amendment.

Jugé:—Que lorsqu'un défendeur a fait motion avant l'enquête pour amender son plaidoyer sur paiement des frais, s'appuyant sur un affidavit déclarant que par suite de son absence du pays, et par maladie, il lui avait été impossible de donner les instructions nécessaires à ses procureurs, et lorsque ce défendeur a depuis fait une motion semblable, lors de l'audition aux mérites, ces deux motions ayant été rejetées, la Cour de Révision renversera le jugement final rendu, et permettra au défendeur de plaider *de novo* sur paiement de tous frais, considérant que le défendeur avait donné des motifs suffisants pour autoriser l'amendement.

Lasell vs. Brown.

151

MUNICIPALITY'S RIGHTS.

Held :—1o. That a prosecution in virtue of the Cons. Stat. for L. C., cap. 6, for selling spirituous liquors without a license, may be brought in the name of a Municipal Council, and that such council is qualified to prosecute in virtue of the 24th Vict., cap. 29, sect. 4, subsect. 20.

2o. That a conviction under the authority of the said act by a Judge of the Sessions of the Peace, cannot be brought before the Superior Court by *certiorari*.

Ex parte George Vaillancourt.

Jugé :—1o. Qu'une poursuite en vertu du chap. 6, Stat. Ref. du Bas-Canada, pour vente de liqueurs spiritueuses sans licence, peut être instituée au nom d'un Conseil Municipal, et que tel conseil a qualité pour poursuivre en vertu de la 24 Victoria, chap. 29, sec. 4, sous-sec. 20.

2o. Qu'une conviction rendue sous l'autorité du dit acte par un Juge des Sessions de la Paix, ne peut être portée devant la Cour Supérieure par *certiorari*.

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PRACTICE.—*Vide* APPEAL, INTERLOCUTORY JUDGMENT.—CERTIORARI.—DEPOSIT.—INSCRIPTION A L'ENQUETE.—PROMISSORY NOTE.—REPRISE D'INSTANCE.—SAISIE-ARRÊT.

PRESCRIPTION.—PROMISSORY NOTE.

Held :—That the prescription of five years against promissory notes, is not a simple presumption of payment, but an absolute prescription which can only be interrupted by a formal acknowledgment of the debt.

Bowker and Fenn.

Jugé :—Que la prescription de cinq ans contre les billets, n'est pas une simple présomption de paiement, mais une prescription absolue, qui ne peut être interrompue que par une reconnaissance formelle de la dette.

73

PRESCRIPTION.—*Vide* MATRIMONIAL RIGHTS.—PROMISSORY NOTES.—RECTIFICATION DE REGISTRE.

PRESENTATION.—*Vide* PROMISSORY NOTE.

PREUVE PAR ECRIT.—*Vide* ACTE DE COMMERCE.

PRIVY COUNCIL.—*Vide* APPEAL, INTERLOCUTORY JUDGMENT.—APPEAL.

PRIVY COUNCIL.

Held :—That there is no appeal to Her Majesty in her privy council, from a judgment of the court of appeals upon an appeal from an interlocutory order.

Lacroix et Moreau.

Jugé :—Qu'il n'y a pas appel à Sa Majesté en son conseil privé, d'un jugement de la Cour d'appel sur appel d'un jugement interlocutoire.

180

PROCÈS-VERBAL.—NECESSITY OF

Held :—1o. That the establishment and opening of a road by a Municipality, in 1859, could only be made upon the *procès-verbal* of a person appointed by the Municipal Council, with the powers of su-

Jugé :—1o. Que l'établissement et ouverture d'un chemin par une municipalité, en 1859, ne pouvait être que sur *procès-verbal* d'une personne déléguée par le conseil de la municipalité, avec les pouvoirs

perintendent of a county, giving notice of his proceedings; and that such *procès-verbal* could not be homologated unless notice of such homologation was given.

20. That on demand to annul a sale made by the municipality, by reason of default of payment of the partition, the defendant could, by an answer to the exception of the defendant, invoke the nullity of a by-law subsequent to the one he complained of.

30. That a party has a direct action, by reason of the nullity of a by-law, without the necessity of making a demand of revision or of appeal from such by-law.

de surintendant de comté, en donnant avis de sa procédure; et que ce *procès-verbal* ne pouvait être homologué, à moins qu'avis n'en eût été donné.

20. Que sur demande en nullité de vente faite par la municipalité, pour défaut de paiement de la répartition, le demandeur pouvait, par une réponse à l'exception des défendeurs, invoquer la nullité d'un règlement subéquent à celui dont il se plaignait.

30. Qu'une partie a l'action directe résultant de la nullité d'un règlement, sans être obligée de prendre la voie de révision ou d'appel du règlement.

La Corporation de la Paroisse de St. Barthélemy et Desorcy. 463

PROMISSORY NOTE.—ACTE EN BREVET, ENDORSEMENT

Held:—That a note en brevet payable to A. B. or his order, cannot be indorsed by a blank indorsement.

Seemle: That it may be by indorsement in full.

Brunet vs. Lalonde, et al.

Jugé:—Qu'un billet en brevet payable à A. B., ou ordre, ne peut être endossé par un endossement en blanc.

Il semble: Qu'il peut être endossé par endossement spécial.

347

DATE OF THE NOTE.

Held:—That the date of a promissory note is proof that such note was made on the day of its date, and that, in the case submitted, the party could not prove that the note had been made upon a day posterior to its date, and that the note in consequence fell within the operation of a subsequent deed of composition between the respondents and their creditors, among whom was the appellant.

Evans et Gros, et al.

409

JUDGMENT ON NOTE.

Held:—That upon action brought upon a promissory note against co-partners, who have failed to put in a plea, judgment may be rendered without its being necessary to go to proof.

Foley, et al. et Forrester, et al.

Jugé:—Que sur poursuite fondée sur un billet promissaire contre des associés, en défaut de plaider, jugement peut être rendu sans qu'il soit nécessaire de faire aucune preuve.

441

NOVATION.

Held:—1o. That a writing merely certifying that a person is indebted unto another in a certain sum of money, is not negotiable as a promissory note.

2o. That the acceptance of a promissory note by a creditor from his debtor, does not effect a novation of his debt, and that he can always bring is action upon the original debt.

Dasyoa, et al. vs. Dufour.

Jugé:—1o. Qu'un écrit constatant seulement qu'une personne doit une certaine somme à une autre, n'est pas négociable comme billet.

2o. Que l'acceptation d'un billet promissaire par un créancier des mains de son débiteur, n'opère pas une novation de sa créance, et qu'il peut toujours porter une action sur la dette originaire.

294

PRACTICE.

Held:—That on a plea of want of consideration to an action on a promissory note, the defendant will be bound to produce the affidavit required by the Con. Stat., L. C., cap. 83, sec. 86, sub-sec. 2.

Kelly, et al. vs. O'Connell.

Jugé:—Que dans une action sur billet promissaire, le plaidoyer que le défendeur n'a reçu aucune valeur, devra être soutenu de l'affidavit requis par le Stat. Ref. du B. C., cap. 83, sec. 86, sous-sec. 2.

140

PRESCRIPTION.

Held:—That according to the provisions of the Consolidated Statute of Lower-Canada, chapter 64, a promissory note will be held to be absolutely paid and discharged five years after it has become due and payable, and that no action upon it can be maintained, even against a defendant making default.

Giard, et al., et Lamoureux.

Jugé:—Que suivant les dispositions du chapitre 64 des Statuts Révisés du Bas-Canada, un billet promissaire est censé absolument payé et acquitté cinq ans après son échéance, et qu'il n'y a pas action pour en obtenir le recouvrement, même contre un défendeur en défaut de comparaître.

201

PRESCRIPTION.

Held:—That a notarial note en brevet is not subject to the prescription of five years, established by the Con. Stat. for Lower Canada, cap. 64.

Séguin de La Salle et Bergevin.

Jugé:—Qu'un billet notarié en brevet n'est pas soumis à la prescription de cinq ans, établie par le Stat. Ref. pour le Bas-Canada, cap. 64.

415

PRESENTATION.

Held:—That presentation of a promissory note at the closed door of a bank, after its usual office hours, is not such a presentation for payment of such promissory note as is necessary upon protest thereof.

Watters vs. Reiffenstein, et al.

Jugé:—Que le seul fait de se présenter à la porte d'une banque, lorsque cette banque est fermée, après ses heures ordinaires de bureau, n'est pas une présentation suffisante pour paiement d'un billet promissaire telle que voulue lors du protêt.

297

RIGHTS OF A CAUTION.

Held:—In the Superior Court,—
10. That the holder of a promissory note is bound only to deliver such note to a *caution* on notarial tender by such *caution* of the amount due, and is not bound to execute any formal subrogation.

20. That in an action against the makers and *caution*, the latter was bound to renew his tender and offer in Court.

30. That, in the case submitted, the insolvency of the makers of the note was proved to have taken place after the tender.

In Appeal:—Judgment confirmed on the ground first above stated.

Jugé:—Dans la Cour Supérieure.—
10. Que le porteur d'un billet promissoire est seulement tenu de livrer tel billet à une caution sur offre par telle caution du montant dû, et n'est pas tenu de faire une subrogation formelle.

20. Que dans une action contre les faiseurs et la caution, ce dernier était tenu de renouveler ses offres en Cour.

30. Que, dans l'espèce, l'insolvabilité des faiseurs du billet était prouvée avoir eu lieu après les offres.

En Appel:—Jugement confirmé par le motif ci-dessus premièrement donné.

Howe and McDonald, et al.

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PROMISSORY NOTES.—*Vide* ENDORSEMENTS.—INJURIES VERBALES.—
PRESCRIPTION.

PROOF.—*Vide* ACTION HYPOTHECAIRE.—GROSS NEGLIGENCE.

PROPRIETAIRES RIVERAINS.—DROITS D'US.

Held:—10. That riparian proprietors on adjacent lots, but holding under the same original title, may make such compact or stipulation with respect to the use of the water of the stream or river flowing along their properties respectively as they may think proper.

20. That the natural use of flowing water, under the common law, cannot be restricted by artificial means, or by the agreements or stipulations of riparian neighbours.

Jugé:—10. Que les propriétaires riverains de lots voisins, mais possédant en vertu du même titre original, peuvent faire tels contrats ou stipulations qu'ils jugent à propos quand à ce qui concerne l'usage de l'eau d'une rivière ou d'un cours d'eau coulant le long de leurs propriétés respectives.

20. Que l'usage ordinaire de l'eau courante, ne peut être restreint, d'après la loi commune, par des moyens artificiels ou par les conventions ou les stipulations des voisins riverains.

Hamel, et al. vs. The Mayor, et al.

129

PROTESTANT MINISTER.—*Vide* MARRIAGE.

PROVINCIAL ARBITRATORS.—*Vide* APPEAL.

QUO WARRANTO.—NECESSITY OF AFFIDAVIT.

Held:—10. That to entitle a party to the issuing of a writ in the nature of a *quo warranto*, a *prima facie* case must be made out on affidavit.

20. That the polling of illegal votes in his favor will not *per se*

Jugé:—10. Que pour autoriser l'émission d'un bref de la nature d'un *quo warranto*, un affidavit établissant *prima facie* cause suffisante, doit être produit.

20. Que l'enregistrement de votes illégaux en sa faveur, n'annule

annul a candidate's election, unless it be alleged and proved that some other candidate had a greater number of legal votes polled in his favor at the said election.

Gibb vs. Poston.

pas ~~par~~ de l'élection du candidat, à moins qu'il ne soit allégué et prouvé qu'un autre candidat avait un plus grand nombre de votes légaux enregistrés en sa faveur à cette élection.

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QUO WARRANTO.—*Vide JURISDICTION.*

RAILWAY COMPANIES.—*Vide TRANSPORT DE MARCHANDISES.*

RESPONSIBILITY OF RAILWAY COMPANIES.

REAL ACTION.—*Vide DEPOSIT.*

RECORD.—*Vide INJURES VERBALES.*

RECTIFICATION DE REGISTRES.

Held:—1o. That the correction of a register by striking out words stating accessory facts, that do not in any way affect the character of the *acte*, or the civil status of persons, cannot be demanded by action.

2o. That the prescription of six months cannot be invoked by a public officer who, although in the exercise of his duties, goes beyond them, and assumes, maliciously, to make entries unnecessary in the accomplishment of his functions; and that in such case the absence of good faith deprives such officer of the rights and privileges granted by law to public officers, acting as such.

3o. That, in the case submitted, the plaintiff had a right to damages, and that a plea of *non sum informatus* would not be permitted on behalf of the defendant, inasmuch as he ought to have known the extent of his obligations, and that they did not extend to enter in registers injurious words in relation to any person.

Côté vs. De Gaspi.

Jugé:—1o. Qu'on ne peut, par voie d'action, demander la rectification d'un registre en y retranchant des mots constatant des faits accessoires, qui ne touchent en rien au caractère de l'*acte*, ni à l'état civil des personnes.

2o. Que la prescription de six mois ne peut être invoquée par un officier public qui, quoique dans l'exercice de ses devoirs, les outre-passe, et se permet, dans un but malicieux, des choses non nécessaires à l'accomplissement de ses fonctions; et qu'alors le manque de bonne foi prive tel officier des droits et privilèges accordés par la loi aux officiers publics, agissant comme tels.

3o. Que, dans l'espèce, le demandeur avait droit à des dommages, et qu'un plaidoyer de *non sum informatus* ne serait pas reçu de la part du défendeur, parcequ'il devait connaître les limites de ses obligations, et savoir qu'elles ne s'étendaient pas à écrire dans les registres des mots injurieux à l'adresse d'aucune partie.

258

REGISTERS OF A COMPANY.

Held:—That a shareholder in a company has no right to insist upon an inspection of the registers of the letters received and sent in relation to the affairs of such company, when orders to the contrary have been given by the directors.

Jugé:—Qu'un actionnaire d'une compagnie n'a pas le droit d'exiger qu'on lui laisse consulter les registres des lettres reçues et expédiées au sujet des affaires de cette compagnie, lorsque des ordres contraires ont été donnés par les directeurs.

Murphy vs. La Compagnie des Remorquants du St. Laurent. 259

REGISTERS OF MARRIAGE.—*Vide* RECTIFICATION DE REGISTRES.REGISTRAR'S CERTIFICATE.—*Vide* COSTS, ON OPPOSITION.

REGISTRAR'S COSTS.

In an action by the sheriff of the district of Montreal, to recover \$8.30, paid to the registrar of the County of Montreal, for registration of a sheriff's deed, and entering discharge of anterior mortgages.

Held:—1o. That the only sum legally payable was \$3.10, as per statement filed with the defendant's plea.

2o. That the sheriff was not justified in bringing in the registrar by action *en garantie*.

Dans une action par le shérif du district de Montréal pour le recouvrement de \$8.30, payées au registraire du comté de Montréal pour l'enregistrement d'un titre du shérif, et pour radiation des hypothèques antérieures.

Jugé:—1o. Que le seul montant légalement dû était \$3.10, ainsi qu'il apparaissait par un état produit avec les défenses du défendeur.

2o. Que le shérif n'avait pas droit de porter une action en garantie contre le registraire.

Bouthillier vs. Berthelet and Bouthillier vs. Ryland.

155

REGISTRATION.—TRANSFER.—*Vide* COSTS, ON OPPOSITION.REGISTRATION OF HYPOTHEC.—*Vide* HYPOTHEQUE.REMUNERATION.—*Vide* ARCHITECTE.RENUNCIATION.—FUTUR SUCCESSION.—*Vide* AUTORISATION MARITALE.

REPRISE D'INSTANCE.—COMMENT DEMANDER.

Held:—That a *demande en reprise d'instance* by the party held to take it up, must be made by petition or by motion, and not by action against the other party in the cause.

Jugé:—Qu'une demande en reprise d'instance de la part de celui tenu de la reprendre, doit être formulée par requête ou par motion, et non par un writ de sommation contre l'autre partie à la cause.

Otté et Masee, et al.

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REPRISES MATRIMONIALES.—*Vide* APPEAL, INTERLOCUTORY

JUDGMENT.

REQUETE CIVILE.—*Vide* APPEAL, INTERLOCUTORY JUDGMENT.

RESPONSIBILITY OF A MUNICIPALITY FOR ROADS.

In an action against a local municipality for a *trouble*, in entering upon plaintiff's land, and making a road, and for the damages thereby occasioned.

Held:—That a municipality cannot avoid responsibility by invoking a *procès-verbal* of a county council duly homologated, ordering the making of a road; inasmuch as no valuation of the amount of compen-

Dans une action contre une municipalité locale pour trouble, résultant de prise de possession d'une partie de la terre du demandeur pour y faire un chemin, et pour dommages en conséquence.

Jugé:—Qu'une municipalité ne peut éviter sa responsabilité en invoquant un *procès-verbal* d'un conseil de comté dûment homologué, ordonnant la confection d'un chemin; en autant qu'une valuation de

sation to be paid to the plaintiff, proprietor of the land taken, had been made in conformity with the Municipal and Road Act of Lower Canada, sec. 50, and that in so entering they had caused a *trouble* to the plaintiff, and were liable in damages.

la compensation qui devait être payée au demandeur, propriétaire du terrain, n'avait pas été faite en conformité à l'acte des municipalités et des chemins du Bas-Canada, sec. 50, et qu'en prenant ainsi possession un trouble avait été causé au demandeur, et que la municipalité était responsable en dommages.

Deal vs. The Corporation of the Town of Phillipsburg.

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DAMAGES.

In an action by the representatives of a deceased person, against the municipality of a parish, to recover damages for his death by an alleged unsafe and perilous winter road, causing the upsetting of a sleigh:

Held:—1o. That where the death is caused, or largely contributed to, by the imprudence and rashness of the deceased, the action cannot be sustained.

2o. That, in the case submitted, there was such imprudence and rashness on the part of the deceased in going with a very heavy load of *bois de longueur*, about midnight, in a dark night after a storm on the previous day; and in leaving the middle of the road, whereby the sleigh got into the ditch and was upset, falling upon the deceased and killing him on the spot, whilst he was trying to bear up the load with his shoulder.

Dans une action par les représentants d'une personne décédée, contre la municipalité d'une paroisse, en recouvrement de dommages allégués avoir été causés par l'état périlleux d'un chemin d'hiver, faisant renverser un traineau:

Jugé:—1o. Que dans le cas où la mort a été causée en tout ou en partie par l'imprudence et l'imprévoyance de la personne décédée, l'action ne peut être maintenue.

2o. Que, dans l'espèce, il y avait telle imprudence et imprévoyance de la part du défunt en allant avec un voyage très pesant de bois de longueur, vers minuit d'une soirée obscure, après une bordée de neige la journée auparavant; et en laissant le milieu du chemin, en raison de quoi le traineau s'était engagé dans le fossé et y avait versé, tombant sur le défunt et le tuant sur la place, pendant qu'il faisait des efforts pour soutenir son voyage.

Charbonneau vs. The Corporation of the parish of St. Martin. 143

RESPONSIBILITY OF A CORPORATION.

In an action of damages brought against the Corporation by an individual injured by a run-away horse:

Held:—1o. That the Corporation is not responsible for the damages caused by the bad state of the roads, although the streets are under its control, and that the act incorporating the City (3 & 4 Vic., cap. 33) has not had the effect of modifying or altering in any manner the 39 Geo. III, cap. 5, sec. 11.

2o. That the Corporation, although obliged to prosecute those

Dans une action en dommages portée contre la Corporation par une personne qui avait été frappée par un cheval échappé:

Jugé:—1o. Que la Corporation n'est pas responsable des dommages causés par le mauvais état des chemins, bien que les rues soient sous son contrôle, et que l'acte d'incorporation de la Cité (3 et 4 Vict., cap. 33) n'a pas eu l'effet de modifier ou d'altérer en aucune manière la 39 Geo. III, cap. 5, sect. 11.

2o. Que la Corporation, quoiqu'obligée de poursuivre ceux qui sont

who, in that respect, violate the rules of Police, is not responsible for damages resulting from the negligence of proprietors or lessees.

en contravention sous ce rapport avec les lois de police, n'est pas responsable des dommages résultant de la négligence des propriétaires ou locataires.

O'Neil et Le Maire de Québec.

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RESPONSIBILITY OF A CORPORATION.—*Vide* CHEMINS D'HIVER.

RESPONSIBILITY OF RAILWAY COMPANIES.

Held:—That after the first of December, when the fences upon lands adjoining the railway are taken down, the Company cannot be held responsible for the loss of cattle that may be killed upon its grounds.

Jugé:—Qu'après le 1er de décembre lorsque les clôtures sont abattues sur les terres avoisinant le chemin de fer, la Compagnie ne peut être tenue responsable de la perte des animaux qui peuvent être tués sur son terrain.

La Compagnie de Chemin de Fer de Montréal et Champlain et Ferrap.

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RETURN TICKET.—*Vide* TRIAL BY JURY.

REVISION.—*Vide* APPEAL.

REVISION OF COSTS.—*Vide* APPEAL.

RIGHT OF ACTION.—*Vide* GARDIEN D'OFFICE.

ROADS.—**SURVEYOR OF.**

Held:—That a surveyor of roads cannot bind a municipality for works executed by his order, without the knowledge of such municipality; and that there must be a contract with the municipal body to bind it.

Jugé:—Qu'un inspecteur des chemins ne peut lier une municipalité pour les travaux qu'il fait faire, à l'insu de la dite municipalité; et qu'il faut une convention avec le corps municipal pour l'obliger.

Lemay vs. La Municipalité de Chester Ouest.

241

ROADS.—*Vide* PROCES-VERBAL.—**RESPONSIBILITY OF A MUNICIPALITY FOR ROADS.**

SAISIE.—*Vide* DECRET, EFFECT ON IMMOVEABLES.

SAISIE.—*Vide* EXECUTION.

SAISIE-ARRET, PRACTICE.—*Vide* AFFIDAVIT.

SCHOOL MUNICIPALITY.—**RIGHTS OF DISSIDENTS.**

Held:—1o. That under the Lower Canada School Act, Con. Stat. L. C., chap. 15, dissentients have a right to determine and limit the application of their school assessments and rates to schools of their own religion; and that this right does not depend on difference of locality, but is a personal right belonging to dissentients in *omni loco*.

Jugé:—1o. Que sous l'acte des écoles du Bas-Canada, Stat. Ref. B. C., chap. 15, les dissidents ont droit de déterminer et de limiter l'application de leurs taxes et cotisations d'écoles aux écoles de leur propre persuasion; et que ce droit ne dépend pas du fait de résidence, mais est un droit personnel appartenant aux dissidents *in omni loco*.

32. That the intention of the legislature in passing the school act was to protect and guaranty every religious belief against teaching repugnant to it, and that it would be contrary to this intention; and to the letter and spirit of the law, so to construe or apply it as to destroy this protection and guarantee.

33. That the legal meaning of the word *inhabitants* in the 55th sect. of the act, does not exclude persons residing out of the limits of a municipality, but who are proprietors of land within it, but on the contrary includes all persons liable to school assessments and rates without regard to their place of residence.

40. That inasmuch as there was proof of record establishing that the defendant belonged to the dissentient minority, and was a proprietor of land within the municipality, although not a resident therein, and that he had notified his dissent to the plaintiffs, and claimed his right to pay to the dissentient trustees—the action of the plaintiffs must be dismissed—the dissentient trustees alone being entitled to collect the amount of the school assessments and rates payable by the defendant.

32. Que l'intention de la Législature en passant l'acte des écoles a été de protéger et de garantir toute croyance religieuse contre une instruction qui y répugnerait, et qu'il serait contraire à cette intention et à la lettre et à l'esprit de la loi, de l'interpréter ou d'en faire l'application de manière à détruire cette protection et cette garantie.

33. Que l'interprétation légale du mot *habitants* dans la 55e sect. de l'acte, n'exclut pas les personnes qui résident en dehors des limites d'une municipalité, mais qui sont propriétaires en icelle, mais au contraire comprend toute personne sujette aux taxes et cotisations des écoles sans égard au lieu de leur résidence.

40. Qu'en tant qu'il y avait preuve au dossier constatant que le défendeur appartenait à une minorité dissidente, et était propriétaire de terre dans la municipalité, quoiqu'il n'y résidait pas, et qu'il avait donné avis de sa dissidence aux demandeurs, et réclamait le droit de payer aux syndics dissidents—l'action des demandeurs devait être renvoyée—les syndics dissidents seuls ayant le droit de faire la collection des taxes et cotisations d'écoles payables par le défendeur.

The School Commissioners of St. Bernard de Lacolle vs. Bowman.

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SEPARATION DE BIENS.—*Vide PLEADINGS.*—**FRACTION, ASSIGNMENT.**

SERVICE OF WRIT.—*Vide EXCEPTION A LA FORME.*

SHAREHOLDER, RIGHTS OF A.—*Vide REGISTRAR.*

SHERIFF'S DEED.—*Vide REGISTRAR'S COSTS.*

SHERIFF'S RETURN, SUFFICIENCY AS EVIDENCE.—*Vide CONTRAINTE PAR CORPS.*

SHIPPING.—*Vide VENDOR, PRIVILEGE.*

STOCKHOLDER.—*Vide BANK MANAGER.*

SUBROGATION.—*Vide CAUTION.*

SURETY COLLATERAL.—*Vide INFANTS, VERBALES.*

SURVEYOR OF ROADS.—*Vide ROADS.*

TACITE RECONDUCTION.—*Vide* ANTICHRESIS.

TESTAMENTARY EXECUTOR.—DUTY OF

Held:—10. That the testamentary executor may be sued alone for the recovery of the *dettes mobilières* of the testator.

20. That the duty of the testamentary executor, thus sued, is to notify the heir of the demand, if there be any doubt, so that he may admit or contest it.

Jugé:—10. Que l'exécuteur testamentaire peut être poursuivi seul pour le recouvrement des *dettes mobilières* dues par le testateur.

20. Que le devoir de l'exécuteur testamentaire, ainsi poursuivi, est de dénoncer la demande à l'héritier, s'il y a doute, afin qu'il l'admette ou la conteste.

Delbry et Campbell, et al.

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TIERS-DETENTEUR.—*Vide* ACTION HYPOTHECAIRE.—DISCUSSION DE BIENS.

TRANSPORT DE MARCHANDISES.—DROITS D'UNE COMPAGNIE.

In the proceedings for an injunction against the Grand Trunk Railway Company of Canada, under the provisions of the Consolidated Statute for Lower Canada, chap. 88, sec. 9, sub-sec. 1, it was alleged that the company had illegally carried on the business of carters, within the City of Montreal, and conveyed freight to and from the City to their depots, and had charged tolls and freight for such conveyance without the authority of any by law approved by the Governor in Council, injuriously to the carters and citizens of Montreal, and a judgment was prayed for declaring that in so doing the Company had exercised franchises not conferred by law, and exceeded their legal powers, and praying also that the Company be enjoined to abstain from using the occupation of carters within the City, and be restrained from carrying freight between the Railway depots and stores and residences in the City.

Held:—1st. That the allegations of the petition as presented were sufficient and would not be rejected on a motion to quash, or on special demurrer.

2nd. That it resulted from the evidence adduced, that the collecting and delivery of freight by car-

Dans des procédures pour une injonction contre la compagnie du Grand Tronc de chemin de fer du Canada, en vertu des dispositions du Statut Refondu du Bas-Canada, chap. 88, sec. 9, sous-sec. 1, il était allégué que la compagnie avait illégalement exercé le métier de charretiers, dans la cité de Montréal, et transporté du fret de la cité à leur dépôt, et du dit dépôt à la cité et avait pour cela prélevé certains taux sans l'autorité d'aucun règlement approuvé par le gouverneur en conseil, au détriment des charretiers et citoyens de Montréal, et l'on concluait à ce qu'il fut déclaré qu'en ce faisant la compagnie avait exercé des privilèges qui ne lui étaient pas accordés par la loi, et avait excédé ses pouvoirs légaux, et concluant aussi à ce qu'il fut enjoint à la compagnie de s'abstenir de charroyage dans la cité, et restreinte du transport de fret entre le dépôt du chemin de fer et les magasins et résidences dans la cité.

Jugé:—10. Que les allégations de la requête, telle que présentée, étaient suffisantes et qu'elle ne serait pas rejetée sur motion pour la faire mettre de côté, ou sur défense au fonds en droit.

20. Qu'il résultait des témoignages produits, que la collection et la livraison de fret par des char-

ters exclusively employed for that purpose by the Company, was not injurious, but on the contrary advantageous to the public.

3rd. That the Company had a right to employ particular carterers exclusively for so collecting and delivering freight; and that this was not in violation of their charter, but was essential or at least incidental to their business as common carriers, and fell within the meaning of "The Act respecting Railways;" (Consolidated Statute of Canada, chapter 66, sec. 8,) which enacts that the Company "shall be invested with all the powers, privileges and immunities necessary to carry into effect the intention and object of this act and of the special act therefor, and which are incident to such corporation, &c."

4th. That the complainants (carterers of the City of Montreal,) had not shewn they had suffered to such extent, as would justify the issuing of the injunction prayed for.

5th. That no injunction will be issued to restrain the defendants from illegal acts which are not shewn to have been directly injurious to the petitioners, and at the same time injurious to the public.

Seemle.—That where the petition alleged that there was no by-law of the Company, approved by the Governor in Council, to regulate and establish the rate of tolls on their road, and the Company alleged that a by-law had been sanctioned by the Governor General according to law, and no proof was adduced by either party in respect of such allegations: The Court will hold the burden of proof to be on the Company, and that no such by-law existed.

retiers exclusivement employés pour cet objet par la compagnie ne faisaient aucun tort au public, mais au contraire lui étaient un avantage.

3o. Que la compagnie avait droit d'employer exclusivement certains charretiers pour la collection et livraison de fret; et que ceci n'était aucune violation de leur charte, mais était essentielle, ou du moins un incident de leur négoce comme voituriers, (common carriers) et tombait sous les dispositions de "l'Acte concernant les chemins de fer;" (Statut R-fondu du Canada, chap. 66, sec. 8,) lequel pourvoit que la compagnie "sera investie de tous les pouvoirs, droits et privilèges qui sont ou pourront être nécessaires pour effectuer les intentions et les objets du présent acte et de l'acte spécial passé à cet effet, et qui seront propres à cette corporation, etc."

4o. Que les plaignants, charretiers de la cité de Montréal, n'avaient pas constaté qu'ils avaient souffert de manière à ce que la Cour fut justifiable à émaner l'injonction que l'on demandait.

5o. Qu'il ne sera émané aucune injonction pour empêcher les défendeurs de commettre des actes illégaux qui ne sont pas constatés avoir été directement injurieux aux requérants, et en même temps injurieux au public.

Il semble.—Que dans le cas où la requête alléguait qu'il n'y avait aucun règlement de la compagnie approuvé par le gouverneur en conseil, pour régler et établir les taux sur leur chemin, et la compagnie alléguait que tel règlement avait été sanctionné par le Gouverneur Général, et qu'aucune preuve ne fut faite par l'une ou l'autre des parties touchant telles allégations: La Cour maintiendra que l'onus probandi incombait sur la compagnie, et que nul tel règlement existait.

TRANSPORT.—*Vide* ACTION HYPOTHECAIRE.

TRIAL BY JURY.—RETURN TICKET.

Held:—At the trial by jury.—10. That the purchase of a return ticket having upon it the words, "Good for day of date, and following day only" is a valid, legal contract, and may be enforced.

20. That if the jury found that the conductor on the train allowed other passengers on the occasion in question to pass on spent return tickets, or that this was the usual practice of the Railway Company, then the plaintiff was entitled to the same treatment, and was not obliged to pay for his return passage, and should obtain a verdict in his favor.

By the Court on motion for a new trial, and a motion for judgment.—

10. That a passenger having a spent return ticket, and offering the same to the conductor, when asked for his fare, cannot from that circumstance alone, be held to have "refused" to pay his fare.

20. That the jury being masters of the facts, and having found a general verdict for \$100, the Court did not feel justified in ordering a new trial.

30. That a conductor who keeps the return ticket handed to him by such passenger, is not justified by law in so doing, and insisting on full return fare being paid.

In appeal:—10. As first held at the trial by jury.

20. That the judge should have directed the jury that the special and valid contract existed, and that the ticket was spent and useless, and that the plaintiff was properly ejected from the cars.

30. That there was no sufficient proof of the alleged practice of the company allowing passengers to use spent return tickets, and that repeated instances being proved of conductors allowing this to be done,

Jugé:—Sur le procès par jury.—10. Que l'achat d'un billet de retour portant les mots: "Bon pour le jour de date et le jour suivant seulement," est un contrat valide et légal, dont on peut contraindre l'exécution.

20. Que si le jury constatait que le conducteur du train avait laissé passer dans la même occasion d'autres passagers portant des billets échus, ou que telle était la pratique ordinaire de la compagnie, le demandeur, dans ce cas, avait droit au même avantage, et n'était pas obligé de payer son voyage de retour, et devait obtenir un verdict en sa faveur.

Par la Cour sur motion pour un nouveau procès, et motion pour jugement.—10. Qu'un passager porteur d'un billet échu et l'offrant au conducteur, sur demande de paiement de son passage, ne peut pas par cela seul être réputé avoir "refusé" de payer le prix de son passage.

20. Que le jury était juge des faits, et ayant rapporté un verdict pour la somme de \$100, la Cour ne pouvait pas accorder un nouveau procès.

30. Qu'un conducteur n'a pas le droit de garder le billet de retour offert en paiement par un passager, tout en exigeant de lui l'entier paiement de son passage.

En appel:—10. De même que premièrement jugé lors du procès par jury.

20. Que le juge aurait dû déclarer au jury qu'il y avait un contrat spécial, et que le billet était échu et avait cessé d'être valable, et que c'était avec raison que l'on avait expulsé le demandeur des cars.

30. Qu'il n'y avait pas preuve suffisante que la compagnie fût dans l'habitude de recevoir comme bons les billets de retour échus, et que quoiqu'il fut prouvé que dans plusieurs cas les conducteurs

could not bind the company, the practice being in contravention of orders

avaient reçu ces billets, ces faits ne pouvaient pas lier la compagnie, cette conduite étant contraire aux ordres donnés.

The Grand Trunk Railway Company and Cunningham.

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TRIAL.—*Vide* NEW TRIAL.

TRINITY HOUSE.—RULES OF

Held:—10. That it is not sufficient that the notice on the part of the captain of a vessel required by the 12 Vic., Cap. 144, Sec. 76, relative to the laws of the Trinity House of Quebec, for the prosecution of pilots accused of gross negligence while in charge of such vessel, should be sent to the harbour master, within the four days next after the arrival of such vessel in port; but such notice must also reach the harbour master within that delay.

20. That proof must be given in the cause that such notice was given and that it was received within the delay fixed.

30. That, in the case submitted, the notice given was insufficient, inasmuch as it contained no complaint against the pilot.

Jugé:—10. Qu'il ne suffit pas que l'avis de la part du capitaine d'un vaisseau, requis par la 12 Vic., Cap. 144, Sec. 76, relatif aux lois de la Maison de la Trinité de Québec, pour la poursuite du pilote accusé de négligence grossière pendant qu'il était en charge de tel vaisseau, soit envoyé au maître de port; mais qu'il faut de plus que cet avis parvienne à sa destination dans ce délai.

20. Que preuve doit être faite dans la cause que cet avis a été donné et qu'il a été reçu dans ce délai.

30. Que, dans l'espèce, l'avis donné n'était pas suffisant, parce qu'il ne comportait pas plainte contre le pilote.

Blouin et Armstrong.

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TROUBLE, GARANTIE DE.—*Vide* GARANTIE.

TROUBLE.—*Vide* RESPONSIBILITY OF A MUNICIPALITY.

USUFRUIT.—*Vide* APPEAL INTERLOCUTORY JUDGMENT.

VENDOR.—PRIVILEGE OF

Held:—That the vendor of a barge not exceeding fifteen tons, cannot claim, by privilege, on the moneys arising from the judicial sale of the said barge, the balance still due to him on the price of sale.

Jugé:—Que le vendeur d'une barge du port de plus de quinze tonneaux, ne peut réclamer, par privilège, sur les deniers provenant de la vente par exécution de cette barge, la balance qui lui reste due sur le prix de vente.

Meloche vs. Hainault et Barré et Nicholson.

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VENIRE FACIAS.—*Vide* DEPOSIT.

VENTE.—*Vide* VENDOR.

VICE DU SOL.—*Vide* ACCEPTANCE OF WORKS.

WILL.—*Vide* CURATOR.

WILL.—VALIDITY OF

10. Every person has a right to dispose of his estate as he may think right, without being obliged to express his motives or give his reasons.

20. Every testator is supposed to be, at the moment of his will, sufficiently in possession of his intellect to enable him to will in a legal manner, in fine, that the possession of one's intellect is the normal state of a human being, unless the individual has been deprived of the exercise of his right to make a will by judicial interdiction, and :

Held:—10. That it is incumbent upon him who attacks a will as made by a person incapable of disposing by will, by reason of weakness of intellect, to prove such weakness, and that the legatee need only keep upon the defensive.

20. That the will made *ab irato* is not in itself null and void, unless it be the result of fraud, of suggestion and of captation.

30. That deceit, fraud, and the absence of intellect are the bases of captation and of suggestion.

40. That the will of a testator, sound of mind, memory and understanding, without suggestion and captation, the results of fraud, is alone sufficient to justify testamentary dispositions, *sic volo, sic jubeo*.

50. That, in the case submitted, the plaintiffs have failed to establish suggestion or captation, on the part of the defendant, accompanied by feebleness of intellect in the testatrix.

10. Tout individu a le droit de disposer comme bon lui semble de ses biens, sans être obligé d'expliquer ses motifs, ses raisons.

20. Tout testateur est supposé être, au moment de son testament, en possession de son intelligence à un degré suffisant pour tester d'une manière légale, en un mot, que la possession de l'intelligence est l'état normal de l'être humain, à moins que cet individu n'ait été privé de l'exercice du droit de tester par une interdiction judiciaire, et :

Jugé:—10. Qu'il incombe à celui qui attaque un testament comme fait par une personne incapable de tester par suite de faiblesse d'esprit, de prouver cette faiblesse d'esprit, et que le légataire n'a qu'à se tenir sur la défensive.

20. Que le testament *ab irato* n'est pas par lui-même frappé de nullité, à moins qu'il ne soit le fruit du dol, de la suggestion et de la captation

30. Que le dol, la fraude, le défaut d'intelligence sont les bases de la captation et de la suggestion.

40. Que la volonté d'un testateur, sain d'esprit, mémoire et entendement, sans suggestion et captation, fruits de la fraude, seule justifie les dispositions testamentaires, *sic volo, sic jubeo*.

50. Que, dans l'espèce, les demandeurs ont failli de prouver suggestion ou captation, de la part du défendeur, accompagnées de faiblesse d'intelligence chez la testatrice.

Evanturel, et vir. vs. Evanturel.

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WRIT.—*Vide* REPRIS D'INSTANCE.

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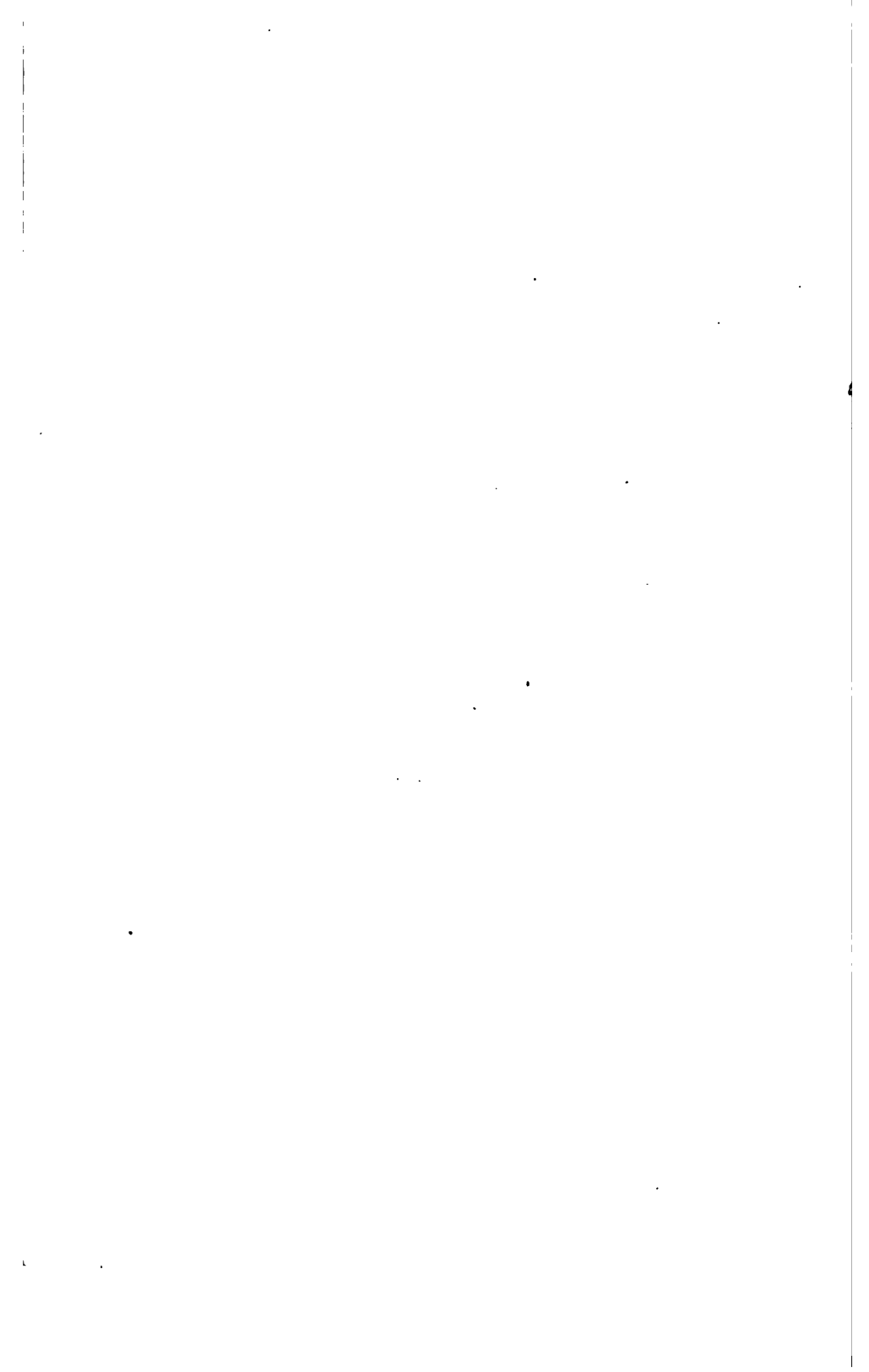
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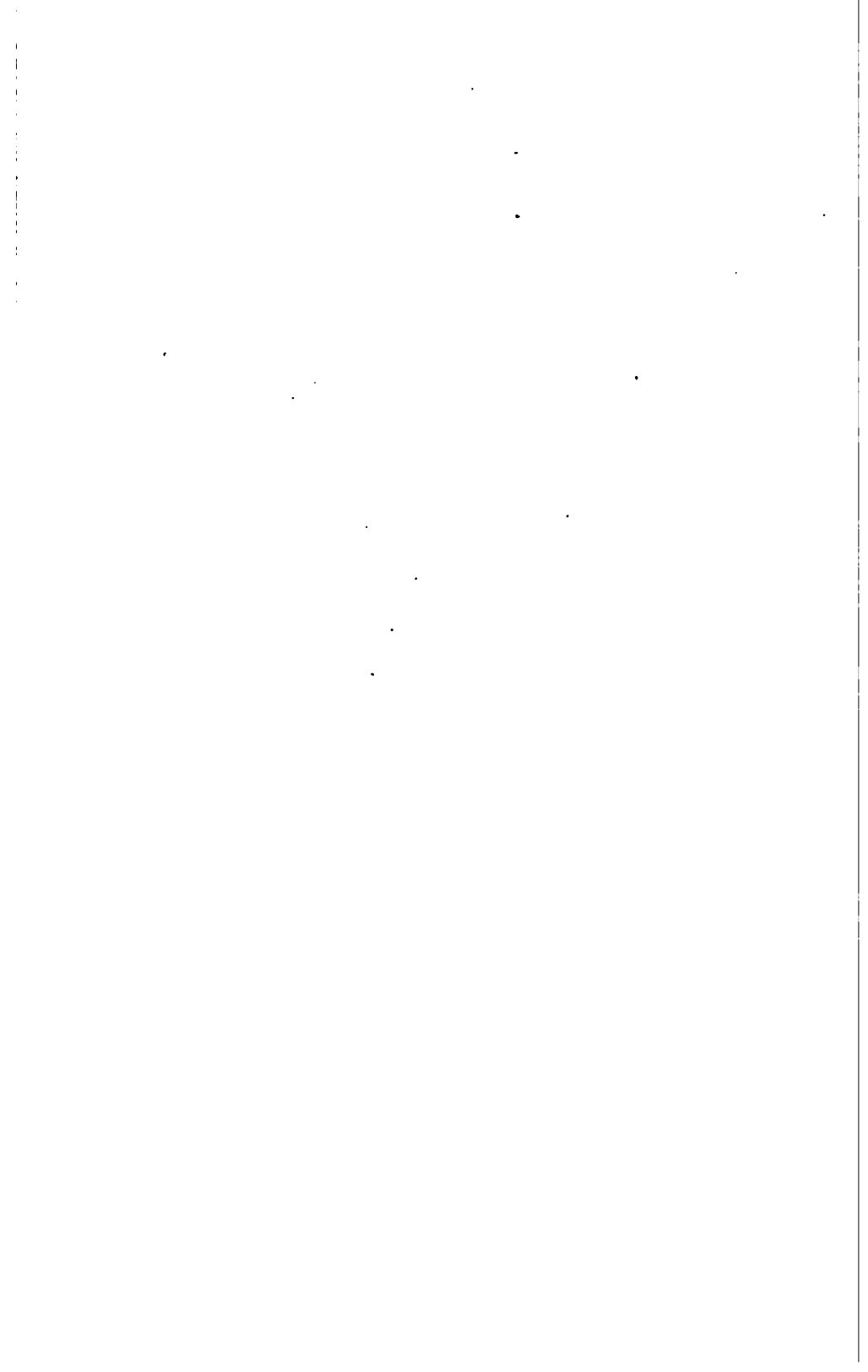
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